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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MICHAEL EUGENE THOMPSON, Petitioner

v.

STATE OF ALABAMA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the State of Alabama's inflexible statutory limitations on funding for representation of indigent defendants in capital cases -- and the chronically inadequate representation which inevitably results from that statutory scheme -- violate the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States where, as here, such strict funding limitations prevented inexperienced appointed counsel from researching fundamental questions of criminal law in capital cases, from having the facts of the case investigated, from developing Petitioner's defenses and strategy, and from pursuing a meaningful appeal?



2. Whether the admission into evidence of Petitioner's confession violates the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, where the State's only evidence of Petitioner's waiver of the right to counsel and of the voluntariness of his confession was limited to the events of the last few minutes before the confessional interrogation began, where the State presented no evidence of lack of coercive conduct during the prior 24 hour custodial period, and where uncontested oral and written evidence established both that the Petitioner repeatedly asserted his rights to remain silent and to obtain counsel, and that the confession was obtained in response to a coercive charade orchestrated by the State?



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GROUND8 OF SUPREME COURT JURISDICTION

The Supreme Court has jurisdiction to review the decision of the Alabama Supreme Court dated June 21, 1991, by writ of certiorari based on 28 U.S.C. §1257.

Petitioner challenges the validity of that final decision based on the ground that it is repugnant to the Constitution of the United States and Petitioner's rights thereunder.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

Applicable Constitutional provisions and statutes, identified here pursuant to subsection Rule 14.1(f) of this Court, include: the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States; and the provisions allowing for appointment and compensation of



counsel contained in the Code of Alabama 1975, Title 15, Chapter 12, Article 2, et seq. As provided in Rule 14.1(f), these Constitutional provisions and statutes are laid out in full in the Appendix.

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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioner Michael Thompson respectfully requests that a writ of certiorari issue to review the decision of the Supreme Court of the State of Alabama denying Petitioner's claim for post-conviction relief.

This petition is based on violations of Petitioner's fundamental constitutional

rights in two areas which bear on the fairness of the trial afforded to Petitioner. First, Petitioner's appointed trial counsel, who were inexperienced in defending capital cases, were unprepared to defend Petitioner at trial due to the \$1,000 limitation on their pre-trial fees imposed by state law. As a consequence, counsel did not commit the necessary time and effort to the case. They thus misunderstood the fundamental legal issues applicable to the proceeding, ignored available constitutional defenses, and offered an ill-conceived defense that in itself assured that Michael Thompson would be convicted and sentenced to death. These same financial constraints also prevented counsel from conducting an investigation of the case, in spite of their awareness of the fundamental importance of such an investigation in defending Petitioner.

This combination of an inability to spend time in preparation for trial as well as a lack of funds to retain investigators

and expert consultants, or to cover their own expenses in pursuing Petitioner's defense, also caused counsel to completely fail to pursue many available defenses. Among these neglected defenses were those related to the lack of corroboration of the State's case and defendant's alibi, the coerced confession, Petitioner's diminished mental capacity arising from his father's violent death and his subsequent alcohol abuse, and numerous factual matters in mitigation of his sentence.

Second, the uncontested evidence shows that the confession offered in the trial court as the primary evidence against Michael Thompson was coerced over a period of more than 24 hours from Friday to Saturday evening. During this period, Petitioner had repeatedly asserted his right to remain silent and asserted his right to counsel, and had refused to sign a document waiving those his rights, which fact was duly noted by the sheriffs. In spite of those assertions of

rights, the questioning periodically recurred until the sheriffs involved resorted to a plan designed to trick and coerce Petitioner into confessing. Despite the foregoing, the State was permitted to establish the putative voluntariness of the confession by offering evidence of Michael Thompson's conduct and his treatment by the sheriffs during only the last few minutes prior to his confessional interrogation, after his will had been broken. At the hearing for post-conviction relief, the State, after finally being forced to comply with the Brady rule by producing the written evidence of Petitioner's refusal to waive his constitutional rights, and with full knowledge of Petitioner's testimony and arguments, nevertheless still failed to present any testimony to contradict the coercive tactics described by Petitioner to the Court.

STATEMENT OF THE CASE

On January 5, 1985, Shirley Franklin, Michael Thompson's former live-in girlfriend, who had recently left Petitioner to return to her husband, gave a statement to the police in response to a reward offer. In the statement, she claimed that Michael Thompson had committed a December 10, 1984 robbery of a convenience store, kidnapped the store's clerk, Maisie Gray, and later shot her. Michael Thompson was arrested early in the evening of Friday, January 5, 1985, and was incarcerated without arraignment or other access to the judicial system until the following Monday.

A. THE COERCED CONFESSION

Petitioner testified at trial that shortly after being arrested he not only asserted his right to remain silent, but also invoked his right to counsel. This testimony was undisputed. It is further supported and corroborated by a waiver of rights form dated January 5th, 1850 hours, which Petitioner

refused to sign and which refusal was entered on the form by the sheriffs then present. The State did not call the officers whose signatures appear on the refused waiver, or any of the other police officers who were present during the 24 hour period leading to his confession, to rebut Petitioner's testimony. Moreover, this essential corroborating document was withheld by the State in defiance of Petitioner's specific motion to produce and thus was not available for consideration by the trial court.¹

The uncontested evidence further shows that, after refusing to waive his rights, Petitioner asked to make a phone call and again requested an attorney. Both

¹ The trial court granted petitioner's motion to produce, which included requests for "any and all statements made by Defendant herein Michael Eugene Thompson," "any and all police reports and detective bureau reports" and "all evidence or information in possession of police or prosecutor which tends to exculpate Defendant or which aids in the preparation of a defense." Nevertheless, the State withheld the waiver form until further requests were made during Petitioner's post-conviction proceedings.

requests were refused. After a sleepless night, Petitioner was repeatedly interrogated on January 6, 1985, but continued to refuse to waive his rights or to make a statement, continued to request an attorney and continued to be denied access to a telephone.

During the afternoon, A.G. Lang, a police investigator from outside the county who was acquainted with Petitioner, was brought in to make a personal appeal to Thompson. Lang misinformed Petitioner that some third party had made statements which led to his arrest -- although it was in fact Shirley Franklin who had implicated Petitioner -- and that the police had arrested Franklin for the murder and had her in custody. Lang moreover led Petitioner to believe that Franklin would be tried if Petitioner did not confess, that the authorities had sufficient information to assure her conviction, and that, because of her prior felony conviction record, she would be sentenced to death once convicted.

Significantly, Lang failed to rebut any of these facts when called to testify.

After this conversation, Petitioner asked to be allowed to talk with Shirley Franklin. Brought in weeping and disheveled, Franklin was in handcuffs, although she was not then, nor had she ever been, under arrest. After an emotional discussion alone with Franklin -- in which she repeatedly stated that she would be tried and put to death if Petitioner did not confess -- Petitioner agreed to save his onetime girlfriend by confessing to the murder. In exchange, Petitioner asked only that Shirley Franklin get him a lawyer. She never did. Shortly thereafter, Petitioner submitted to a confessional interrogation.

When that recorded confession was offered into evidence at trial, the only testimony offered by the State on the question of voluntariness was given by Sheriff McDowell, who, by his own admission, had no personal knowledge of the

circumstances leading up to the confession and was merely brought into the room at the last moment to take the confession. Sheriff McDowell's statement that neither he nor anyone in his presence used threats, coercion, or persuasion to compel the statement therefore should have been given no weight.²

Despite these facts, the trial court found that the confession was voluntarily made and admitted it into evidence.³

² The taped interrogation was presented in an arranged and incomplete form at trial, since the tape recorder used to tape it was turned on and off repeatedly during the questioning.

³ A second brief statement alleged to have been made in the presence of investigator Larry Fowler on the afternoon of January 8, 1985, literally moments before Thompson was to see his appointed counsel for the first time, was also improperly admitted. Investigator Fowler admittedly failed to advise Petitioner of any of his rights and it was shown that, after Fowler later wrote down the alleged statement, Petitioner was never given an opportunity to read over the alleged statement, or in any way given the opportunity to determine its accuracy. The State also failed to produce the other witness to the alleged conversation, Investigator Robert Walker. Petitioner
(continued...)

By the time of trial, Petitioner had learned of the deceptive charade that had led to his agreement to confess. After the confession was admitted at trial, Thompson, consumed with rage and betrayal, did not attempt to clear himself when called to testify, but instead only sought to implicate Shirley Franklin. Thus, Petitioner's trial testimony itself was tainted as the direct result of the earlier coercive tactics utilized by the State.

B. CONDUCT OF COUNSEL

From the moment of their appointment on January 8, 1985, the conduct of Michael Thompson's reluctant counsel severely prejudiced his defense.

John Dobson and B.J. McPherson were appointed as co-counsel for Michael Thompson's trial under authority of Alabama Code Title 15, Chapter 12, Article 2. That statute provides that appointed counsel in

³(...continued)
vigorously denied ever making such a statement.

capital cases may each be paid a maximum of \$1,000 for pre-trial preparation at the rate of \$20 per hour. The statute does not permit additional pre-trial compensation even in extraordinary cases. While the statute does give the court discretion to approve reimbursement for "reasonable" expense requests made in advance, in practice such funds are rarely forthcoming, so that, in the case below, appointed counsel did not bother to make such requests. The reality of inadequate funding was graphically explained by one of the appointed counsel during questioning at the post-conviction hearing, when he was asked why he did not hire an investigator: "I would have had to pay for it out of my own funds, and I had three kids in college, and I couldn't afford it."⁴

⁴ Alabama's statutory scheme does not limit the number of hours which an appointed attorney can be compensated for during trial, but he is limited to a rate of \$40 per hour. On appeal, another \$1,000 limit at \$20 per hour applies.

The inevitable results of such a system are borne out by what happened to Michael Thompson. However well intentioned counsel may have been, their lack of experience, lack of funding, and lack of time commitment ensured that Michael Thompson was denied adequate or meaningful representation.

At the post-conviction proceeding, appointed counsel Dobson testified that "[t]he overall strategy of the trial was one of diminished capacity, limited participation, addiction to drugs and alcohol, and remorse." This explanation suggests that counsel intended to attempt to avoid conviction and a capital sentence by showing that Michael Thompson lacked intent, did not himself pull the trigger, and acted to the extent he did only as the result of the mitigating circumstance of his personally tragic life and substance addiction. However, though counsel suggested this approach in hindsight, they did not pursue it in the trial, largely because they were

lacking in experience in such cases, uncompensated, unsupported financially, and, as a result, wholly unprepared.

In opening argument, inexperience and lack of preparation were evident in counsel's stumbling, harmful emphasis of the fact that they were appointed and did not represent Mr. Thompson by choice, their declaration that this was a terrible crime with gruesome evidence, and their failure to annunciate any reasonable defense or given any other indication that any trial strategy was ever developed. Defense counsel went on to argue that the evidence would show that Thompson committed robbery and kidnapping, but that Shirley Franklin had pulled the trigger. However, under Alabama law, Petitioner could be sentenced to death even if the jury believed that Shirley had committed the murder. Indeed, during post-trial proceedings Dobson admitted that his opening was in fact a statement that Thompson was guilty of capital murder.

Nevertheless, counsel presented this as their only defense. As the apparent result of their lack of preparation, counsel then failed to conduct adequate research to understand that they had to request the lesser included offense instructions of manslaughter and robbery based on those facts.

Counsel also failed to prepare to meet the allegations of the State's key witnesses. The State's case was based almost exclusively on the coerced confession and the testimony of Shirley Franklin. Yet, counsel did not hire investigators to establish facts to discredit her alibi nor did they expend the time and funds needed to obtain her conviction record, despite their awareness that Franklin was a felon. Similarly, they did not spend the time and funds needed to establish whether a deal had been struck between the prosecution and Franklin. Lacking any factual information to go on, counsel were reduced to an attempt to impeach

Franklin's testimony by alleging her provocation of other armed robberies with Petitioner.

The overall lack of preparation also marked the testimony of Petitioner. Counsel were informed by Petitioner of the coercive nature of his purported confession. Yet, counsel were not prepared to present a challenge based on these facts, and indeed failed to question Michael Thompson regarding these facts or to otherwise bring them to the trial court's attention when the court considered the admissibility of Thompson's confession.

Counsel also did not expend the time needed to research the legal standards regarding admissibility of confessions. In ruling that the confession was freely made, the trial court expressly relied upon the "collateral benefit" doctrine. The Alabama Supreme Court, however, had expressly rejected that doctrine some seven years prior to the trial in Holt v. State, 372 So. 2d 370

(Ala. 1978), which case and ruling counsel were unaware of.

Appointed counsel stated in post-trial proceedings that one of the most important tasks for a capital defense attorney is the thorough investigation of the defendant's life history. However, they also testified that they could not afford, and thus made no serious attempt to undertake, an investigation. They did not investigate the obvious dissimilarities in the physical descriptions offered by witnesses of the suspect and car and the actual appearance of Petitioner and his car; they did not seek to have the car or the victim's body examined for specimens which could have exculpated Petitioner; and they never investigated Petitioner's explanation of events showing that he was not involved in the crime.

Similarly, appointed counsel understood that, at age 16, Petitioner had suffered serious mental distress when his father was murdered in a dispute concerning a

debt owed by the murderer to Petitioner. They were also aware that this devastating event had driven Petitioner to the addictions to drugs and alcohol that continued to impede Petitioner up to the time the crime was committed. Counsel only began to realize the significance of these facts, and acted to obtain approval of a request for psychiatric support, 18 days before the trial -- fully 3 1/2 months after they were retained.

Although the psychiatric report's only unhelpful conclusion was that Petitioner was fit to stand trial, counsel were unable to evaluate or research the issues raised by the psychiatrist's report, and thus they simply decided that it was not useful. Counsel failed to recognize the relevance of the report's other conclusions, which stated that Petitioner was suffering from diagnosable psychiatric disorders: substance abuse and anti-social personality, a serious DSM III emotional disturbance or disorder. These diagnosed illnesses could have been

used as the cornerstone of a defense designed to negate specific intent. Yet, at no time did either counsel try to establish such a defense. Indeed, McPherson's post-conviction testimony revealed that he did not even recognize the possibility of such a defense.

As a consequence of having developed no legal or factual defenses, appointed counsel placed Petitioner on the stand and permitted him to testify, either without realizing or without having taken the time to advise Petitioner that he could be found guilty of capital murder and sentenced to death even if the court accepted his testimony that Franklin had been responsible for the crime. Thompson's motivation at the time was to strike out at Franklin, but, because the legal effect was unexplained to him, he only implicated himself.

Lack of preparation and planning also marked the closing arguments presented to the jury during the guilt phase. Dobson conceded that he simply never took the time to prepare

a closing argument for that phase of the trial.

A similar lack of preparation was present at the penalty phase. Counsel did not expend the time or money needed to seek out and prepare witnesses to testify at that phase. Additionally, Petitioner's mother later testified that counsel did not take any time to prepare her for her testimony during the penalty phase; their only instruction was for her to beg for mercy and her son's life.

Additionally, counsel failed to conduct the research needed to understand the legal significance and mitigating value of Petitioner's personal history in relation to the sentencing stage of the trial. At no time during Petitioner's testimony had they tried to establish that Petitioner's traumatic history had a bearing on his loss of control of his life and that the resulting use of drugs and alcohol, even on the night of the crime, would have made the imposition of a death sentence both inappropriate and

useless to achieve any valid state purpose. They similarly did not seek to establish mitigation based on Petitioner's feelings of contrition and anguish over Maisie Gray's death.

Other facts which counsel either never spent the time to learn about or never learned the significance of included that, despite having dropped out of school in the eighth grade, Petitioner had worked productively at several jobs and been considered a stable and skilled employee, that he had attempted to overcome his drug and alcohol addiction through religion, that he was a loving and caring uncle and supportive brother-in-law, and that he had also attempted to help others to overcome problems in their lives.

Consistent with that, counsel did not prepare witnesses such as Petitioner's uncle, sister-in-law, pastor, and mother, as well as a psychiatrist, to address these issues. Counsel also did not obtain Petitioner's

medical and school records. They then disregarded what available facts there were in closing argument on the penalty phase, in an argument which also had not been prepared by counsel.

All of these failures appear from the record to have resulted from a combination of lack of preparation of evidence as well as counsels' failure to spend the significant time and research needed to formulate a developed strategy founded in existing law. The resulting disorganization and lack of purpose that followed came predictably from the limited time and money counsel could afford to devote to the matter before trial.

While appointed counsel were apparently able attorneys in their own practice areas (in fact, Dobson subsequently became an Alabama state court judge), who presumably desired to present an adequate defense, appointed counsel simply did not have the time and resources necessary to

adequately represent Petitioner.⁵

Michael Thompson was found guilty of capital murder at 5:35 p.m. on Friday May 10, 1985. Thirty minutes later, at 6:05 p.m., the penalty stage began and was completed within about an hour. After argument, counsel then allowed the court to commit the gross error of instructing the jury that their verdict was merely advisory, an instruction which was particularly harmful because it was already late Friday night of Mother's Day weekend.

⁵ There is a strong inference that appointed counsel were well aware that they had not provided Petitioner with adequate counsel for such capital case. In the midst of the guilt stage of the trial, on May 8, 1985, they asked that Michael Thompson handwrite and execute the following statement:

I am satisfied with the work done by my lawyers in this case. I believe they have represented me well, and in a competent manner. I have no complaints to make. All suggestions I have made they have followed, and, they have interviewed every witness and conducted all investigations which I have requested.

The embarrassment in such an act by an attorney is rather painfully apparent.

In less than 20 minutes, the jury returned their "advisory" verdict to the judge that a death sentence should be imposed.

On appeal to the Alabama Court of Criminal Appeals and the Alabama Supreme Court, appointed counsel were similarly ineffective. Counsel failed to raise many issues on appeal which would have constituted reversible error, and which should have resulted in a successful appeal.⁶ Both courts affirmed Michael Thompson's conviction.

In February, 1990, the Circuit Court of Blount County issued an Opinion and Order rejecting Michael Thompson's Petition seeking post-conviction relief under Rule 20 of the

⁶ In the State post-conviction proceedings, these issues were raised where arguably possible on the Rule 20 appeal based on the argument that the error had never been reviewed by the appellate courts because of the lack of effective assistance of counsel. However, the Alabama courts held that those issues were waived by virtue of appointed counsel's failure to properly preserve or present them in the courts below.

Alabama Temporary Rules of Criminal Procedure ("Rule 20").⁷

In January, 1991, the Alabama Court of Criminal Appeals affirmed the trial court's denial of Michael Thompson's petition seeking Rule 20 relief.⁸ The Supreme Court of Alabama denied Michael Thompson's petition

⁷ The ineffective assistance of counsel and improperly admitted confession claims were both raised, inter alia, in the Rule 20 petition filed with the Circuit Court of Blount County on May 9, 1989. The Rule 20 hearing brought out direct and inferential testimony on the effect of the statutory financial limitations on counsel. These claims were rejected by that Court in its Opinion and Order dated February 15, 1990, which is included in the appendix to this Petition.

⁸ The appeal of the Circuit Court's rejection of Petitioner's Rule 20 petition also asserted the ineffective assistance of counsel, including raising the effect of statutory financial limitations on compensation for counsel, and improperly admitted confession claims in a brief filed with the Alabama Court of Criminal Appeals. That Court, in an opinion dated January 18, 1991 (which opinion is also included in the appendix to this Petition), again rejected Petitioner's claims.

for Review on June 21, 1991.⁹

REASONS FOR GRANTING REVIEW

- I. THE SUPREME COURT SHOULD GRANT REVIEW OF THIS PETITION TO RESOLVE SPECIAL AND IMPORTANT FEDERAL QUESTIONS RELATING TO WHETHER ALABAMA'S INFLEXIBLE STATUTORY LIMITATIONS ON COMPENSATION PROVIDED TO APPOINTED COUNSEL FOR INDIGENT DEFENDANTS IN CAPITAL CASES VIOLATE CONSTITUTIONAL GUARANTEES OF EFFECTIVE ASSISTANCE OF COUNSEL, A FAIR TRIAL, DUE PROCESS AND EQUAL PROTECTION OF LAW. SUCH REVIEW IS PARTICULARLY APPROPRIATE BECAUSE OF A CONFLICT BETWEEN THE HIGHEST COURTS OF FLORIDA AND ALABAMA ON THESE FEDERAL QUESTIONS, AND BECAUSE THESE IMPORTANT QUESTIONS OF FEDERAL LAW HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

This court consistently has held that the Sixth Amendment requires that the States provide representation for indigent defendants that, in the totality of circumstances, works to assure that the trial court's outcome is just. See Strickland v. Washington, 466 U.S. 668, 687-688 (1984).

⁹ The ineffective assistance of counsel and improper admission of the confession issues were also raised, inter alia, in a petition for Review filed with the Alabama Supreme Court. By an Order dated June 21, 1991, that Court again rejected Petitioner's claims. That Order is included in the appendix to this Petition.

Moreover, this Court recognizes that the death penalty is "qualitatively" different from other forms of punishment. E.g., Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Accordingly, it has acknowledged that "the fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "'need for reliability in the determination that death is the appropriate punishment'" in any capital case." Johnson v. Mississippi, 486 U.S. 578, 584 (1988) (quoting Gardner v. Florida, 430 U.S. 349, 363-64 (1977)).

Petitioner submits that the required levels of representation and reliability are denied where the maximum fee set by a statutory scheme for payment of appointed attorneys assures that the inexperienced counsel who will be appointed to defend capital defendants will not be able to expend the time and money needed to present an adequate defense. Indeed, such statutory

limits deny counsel the time needed to research and understand the numerous legal standards affecting and benefitting their clients and to delve into the facts needed to defend their clients, and the money to hire investigators, engage in travel and retain consulting experts. All of these commitments of time and resources are fundamentally necessary to defend capital cases.

In recent years, the Supreme Courts of two States have recognized that statutory caps on compensation for appointed counsel violate or derogate the accused's right to effective representation under the Sixth Amendment. The Supreme Court of Alabama has, however, rejected such arguments. A gross disparity has therefore arisen between Alabama and other states whereby a defendant's constitutional rights in Alabama simply do not have the same meaning they have in other states. In Alabama, appointed counsel will never be able to afford to learn what those rights are and will never have the

financial resources needed to develop the facts needed to vindicate those rights.

In Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986), cert. denied 479 U.S. 1043 (1987), the Florida Supreme Court held that when applied to difficult cases, a statutory maximum fee of \$3500 paid to appointed counsel "interferes with the Sixth Amendment right to counsel." Id. at 1112. White v. Commissioners of Pinellas County, 537 So. 2d 1376, 1379 (Fla. 1989) extended the scope of Makemson by ruling that "all capital cases by their very nature can be considered extraordinary and unusual" and require a departure from statutory maximum payments. Id. at 1378. Again, the court reiterated that its primary concern was with "an indigent defendant's right to competent and effective representation, not the attorney's right to reasonable compensation." White, 537 So. 2d at 1379.

The Florida Supreme Court further emphasized that the "relationship between an

attorney's compensation and the quality of his or her representation cannot be ignored." White v. Commissioners of Pinellas County, 537 So. 2d at 1379. "It may be difficult for an attorney to disregard that he or she may not be reasonably compensated for the legal services provided due to the statutory fee limit A spectre is then raised that the defendant received less than the adequate, effective representation to which he or she is entitled, the very injustice appointed counsel was intended to remedy."

Id.¹⁰

¹⁰ Both Congress and the Bar have recognized the nexus between adequate compensation and adequate representation where capital punishment is involved.

The Criminal Justice Act of 1964 generally limits the fees available to lawyers representing indigents in federal court to \$2500. 18 U.S.C. § 3006A(d)(2). Yet, in reenacting a federal death penalty, Congress specifically provided that attorneys representing capital defendants would be entitled to reasonable compensation without being subject to any such limitation. 21 U.S.C. § 848(q)(10). The American Bar Association even more expressly has concluded that "[w]ithout adequate compensation, the right to [appointed] counsel in capital cases is merely illusory." American Bar

(continued...)

In the instant case, we need not speculate regarding the spectre of the harm. The record is too clear on that point. In spite of the natural desire of humans to defend their actions, the post-conviction testimony of Petitioner's appointed counsel demonstrates they were ever-conscious of the financial constraints imposed by the Alabama statute. Indeed, the most tragic and damning indictment of Alabama's compensation system came from one of Petitioner's appointed counsel: "I would have had to pay for it [the investigation] out of my own funds, and I had three kids in college, and I couldn't afford it."

The court of last resort of another jurisdiction has reached a similar result, relying on the same sort of analysis. In State v. Robinson, 465 A.2d 1214, 1216 (N.H.

¹⁰ (...continued)

Association, Toward a More Just and Effective System of Review in State Death Penalty Cases, at p. 64 (October 1989).

1983), the New Hampshire Supreme Court lifted the statutory \$500 cap on fees in misdemeanor cases on a case-by-case basis in order to avoid unfairness and unreasonableness to the attorney and also to "adequately protect both the indigent defense fund and the right of an accused citizen to effective assistance of legal counsel."¹¹

Yet, in Ex Parte Grayson, 479 So. 2d 76 (1985), cert. denied Grayson v. Alabama, 474 U.S. 865 (1985) the Alabama Supreme Court rejected an argument that statutory maximum payments violate rights of adequate

¹¹ In many states, of course, this issue never will be confronted because adequate compensation schemes have been legislatively created to vindicate the Sixth Amendment right to counsel. See, e.g., Cal. Penal Code § 987.2 (appointed criminal defense counsel "shall receive a reasonable sum for compensation and for necessary expenses"); Tex. Crim. Proc. Article 26.05 (reasonable fees and expenses for all reasonable and necessary time spent on the case.) In other states, the courts have found statutes which place maximums on fees paid to appointed counsel unconstitutional on other grounds. State ex rel. Stephen v. State, 242 Kan. 336, 747 P.2d 816 (1987) (inadequate compensation of appointed attorneys is unconstitutional taking); DeLisio v. Superior Court, 740 P.2d 437 (1987) (same).

representation, due process, and equal protection. That decision is now settled law in Alabama. The inevitable result of the decision in Grayson is borne out here. Indigent prisoners in Alabama receive a level of representation which the highest courts of other states have found constitutionally invalid. In fact, courts in both New Hampshire and Florida applying constitutional standards would in certain cases authorize more money for the defense of a misdemeanor case than an Alabama court could authorize for a capital case. This virtually unbelievable discrepancy, when coupled with the performance of trial counsel below, requires that certiorari be granted so that the issues raised by this case can be fully briefed and argued.

Petitioner additionally submits that this systemic problem cannot be corrected through the application of the case-by-case constitutional standard regarding the effective assistance of counsel set forth in

Strickland v. Washington, 466 U.S. 668 (1984). That standard seeks to ascertain whether counsel failed to possess or to employ "such skill and knowledge" or make a reasonable effort to "render the trial a reliable adversarial testing process."

Strickland, 446 U.S. at 688.

However, in spite of the wide-ranging failures of appointed counsel to carry out their obligations to Petitioner, both the Alabama Court of Criminal Appeals and the Alabama Supreme Court found that skill, knowledge and effort of appointed counsel were adequate to meet the Strickland standard. Thompson v. State, 581 So.2d 1216, 1219 (Ala. Crim. App. 1991), cert. denied No. 1900927 (Ala. June 21, 1991).¹² Petitioner

¹² Those failures by appointed counsel included the following: (1) developed no defense strategy and presented no theory of defense; Strickland v. Washington, 466 U.S. 668 (1984); Magill v. Dugger, 824 F.2d 879, 884-885 (11th Cir. 1987); (2) failed to investigate their client and the case against him, Magill, 824 F.2d at 886 n.11, 889-890; Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986), cert. denied 481 U.S. 1042 (continued...)

submits that the conclusion of those courts is simply another way of saying that the performance of appointed counsel in this case was similar to that of other such appointed

¹²(...continued)

(1987); (3) neglected to present facts regarding Thompson's repeated refusal to waive his rights; (4) did not understand the applicable law regarding the consequences of Thompson's testimony and their arguments; (5) failed to know that the Alabama Supreme Court had rejected the legal doctrine explicitly relied on by the trial court in admitting the confession; (6) neglected to prepare Michael Thompson for his trial testimony; MaGill, 824 F.2d at 889-90; (7) failed to prepare closing arguments for either trial phase; (8) repeatedly failed to object to the actions of the prosecution; United States v. Lamerson, 457 F.2d 371, 372 (5th Cir. 1972); (9) offered statements suggesting that Petitioner had an extensive criminal background; (10) failed to investigate or present key mitigating facts; Mathis v. Kant, 704 F. Supp. 1062, 1063 (N.D. Ga. 1989), amended in part 708 F. Supp. 339 (N.D. Ga. 1989); (11) failed to prepare for the penalty phase; King v. Strickland, 714 F.2d 1481, 1490-91 (11th Cir. 1983); (12) made statements emphasizing that the crime was heinous and that counsel were appointed by the court; King v. Strickland, 714 F.2d at 490; Mathis v. Kant, 704 F. Supp. at 1063-64; (13) failed to investigate and offer mitigating evidence; California v. Brown, 479 U.S. 538, 545 (1987); (14) made no effort to investigate and develop a viable approach to the defense; Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986), cert. denied 479 U.S. 966 (1986); and, (15) offered no psychiatric evidence.

counsel which those courts have reviewed. As opposed to being an endorsement of the reliability of the system, it points to the systemic failure to provide meaningful representation to indigent capital defendants in Alabama.

Moreover, the most insidious problem with providing inadequate compensation to the attorneys and no funds to pay for investigations and other necessary expenses is that its effect is normally difficult or impossible to identify, especially because there is such a natural desire by well-meaning appointed counsel to argue that they still did an adequate job. We are fortunate that trial counsel in this case made so clear, if Petitioner could have paid that same attorney reasonable rates for his services -- so the attorney could pay his children's college bills -- Petitioner would have received far better representation than he got. The question is thus inescapable as to whether a system can be constitutionally

sound when the representation afforded a capital defendant is below that found in a standard commercial matter in rural Alabama. See, Griffin v. Illinois, 351 U.S. 12, 19 (1956) ("[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has").¹³

In setting a maximum fee of but \$1000 for pre-trial work performed by appointed counsel of capital defendants, the Alabama legislature has moreover ignored the express

¹³ Indigent defendants such as Petitioner are often represented by lawyers who are "handicapped by a system that provides disincentives to thorough and effective representation." The National Law Journal, June 11, 1990, at 35, col. 4. Frequent shortfalls at trial include "inadequate penalty phase investigation, unskilled voir dire, lack of affirmative defenses in both phases, [and] failure to object and to preserve issues for appeal." Id. at 36, col. 1. "[A]ggravating defense counsel's lack of experience is Alabama's compensation system The State pays appointed defense counsel \$20 per hour for out-of-court time, with a cap of \$1,000 per trial phase, and \$40 per hour for in-court time (no cap) and 'reasonable' expenses. Although all reasonable expenses are to be reimbursed, lawyer after lawyer insisted funds were inadequate and that judges made clear very early there were limits." Id. at 36, col. 1.

guidance of this Court to ensure the reliability of the state's capital punishment system in order to meet the requirements of the United States Constitution. See Johnson v. Mississippi, 486 U.S. at 363-64. The Alabama Supreme Court has perpetuated the problem by failing to correct that error.

Finally, under circumstances such as these, it is hardly surprising that Petitioner's counsel failed to give him effective representation. Their admitted lack of experience in capital cases, combined with severe financial constraints, posed almost insurmountable obstacles. Although it is true that the state is not, and indeed cannot be, required to provide indigent defendants with the best representation that money can buy, the representation provided by Alabama's statutory scheme falls so far short of adequate that Petitioner's due process right to a fair trial was violated.

Petitioner thus requests that this Court grant certiorari to determine whether

mandatory fee caps in capital cases, when coupled with the distinct threat they pose to effective assistance of counsel, violate the accused's Sixth Amendment right to effective assistance of counsel, as well as the Fifth and Fourteenth Amendment right to due process and equal protection of law. Pursuant to Supreme Court Rule 10.1(b), issuance of a writ of certiorari is appropriate in this case to resolve a conflict between the decisions of sister States on a federal question. Certiorari is also appropriate because this Court has never determined whether fee caps violate constitutional guarantees afforded capital defendants.

II. THE SUPREME COURT SHOULD GRANT REVIEW OF THIS PETITION TO RESOLVE SPECIAL AND IMPORTANT FEDERAL QUESTIONS RELATING TO WHETHER A STATE MAY MEET ITS BURDEN OF PROVING THE WAIVER OF RIGHT TO COUNSEL AND THE VOLUNTARINESS OF A CONFESSION MERELY BY REFERRING TO THE STATE OF FACTS AT THE MOMENT THE WAIVER AND CONFESSION ARE OBTAINED OR WHETHER IT IS REQUIRED TO ESTABLISH THAT THE CUSTODIAL PERIOD IN ITS TOTALITY IS NON-COERCIVE. SUCH REVIEW IS ESPECIALLY APPROPRIATE BOTH BECAUSE THESE IMPORTANT ISSUES OF FEDERAL LAW HAVE BEEN DECIDED BY THE ALABAMA COURTS AND HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT, AND BECAUSE THE ALABAMA COURT DECISIONS CONFLICT WITH EXISTING DECISIONS OF THIS COURT.

A. The State Court's interpretation of the degree of evidence needed to prove that Petitioner's alleged waiver of right to counsel and alleged confession were voluntary violates constitutional requirements.

When an accused asserts his right to counsel, the State has the burden of proving the existence of a voluntary waiver.

Michigan v. Jackson, 475 U.S. 625 (1986)

("[I]t is the State that has the burden of establishing a valid waiver"); Johnson v.

Zerbst, 304 U.S. 458 (1938) (heavy burden on

the state to prove waiver of constitutional rights). It is similarly well settled that the State has the burden of proving the voluntariness of an accused's confession. Lego v. Twomey, 404 U.S. 477 (1972).

In Miranda v. Arizona, 385 U.S. 436, 475 (1966), this Court gave the rationale for placing such a burden on the State:

Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

Id. at 475.

The burden thus is on the State to prove that the methods used to obtain both the waiver of right to counsel and any confession do not violate the fundamental fairness requirements of due process. Generally, courts are to indulge in every reasonable presumption against waiver of such fundamental constitutional rights. See e.g., Brewer v. Williams, 430 U.S. 387, 405 (1977); Brookhart v. Janis, 384 U.S. 1, 4 (1966).

Recognizing the frequently conflicting evidence on the issue of voluntary waivers, the Court in Michigan v. Jackson specifically reasoned:

[W]e should "indulge every reasonable presumption against waiver of fundamental constitutional rights." (citation omitted). . . Doubts must be resolved in favor of protecting the constitutional claim. This settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel. . . .

Michigan v. Jackson, 475 U.S. at 634.

In spite of the strong and clear guidance provided by this Court, the Alabama courts have found that the State sustained its burden of proving the voluntariness of both Petitioner's alleged waiver of his right to counsel and alleged confession based solely on the testimony of a single sheriff who admittedly only saw Petitioner during the last few minutes of the over twenty-four hours of incarceration prior to the alleged waiver, and who only testified as to what took place in his presence. The State failed to produce any evidence which would establish

that the State's conduct was not coercive during the remainder of the approximately twenty-four hours that Petitioner was in custody. In fact, the State even withheld the crucial document, the waiver of rights form that Petitioner refused to sign after being taken into custody, which so strongly suggests that Petitioner's waiver and confession were not voluntary. See North Carolina v. Butler, 441 U.S. 369 (1979).

Moreover, the findings of such waiver and voluntariness were sustained at the post-trial hearing in spite of the State's admitted violation of the Brady rule, the uncontradicted documentary and oral evidence of Petitioner regarding his repeated assertions of the right to counsel and to remain silent and the coercion and trickery tactics used to obtain a confession.

Petitioner thus submits that his Petition should be granted to vindicate these key constitutional rights. More specifically, the State's burden of proof

should be expanded to require the State to unequivocally establish the absence of coercion during the entire period of custody and not just during a time fragment convenient to the State, when a "clean" witness can come in at the last minute to look at a "set stage" and say that no coercion was present.

Further, a second principle should be established to require the State to prove that, once a prisoner refuses to waive his rights, nothing has occurred between the time of the refusal to waive rights and the waiver which could have had a coercive effect on the defendant.

- B. Both the alleged waiver of the right to counsel and the alleged confession were the direct result of coercive tactics designed to overbear the will of Petitioner, and thus were involuntary.

It is well established that the State must clearly show "an intentional relinquishment or abandonment of a known right or privilege" in order for a waiver of a right to counsel to be valid. See e.g.,

Brewer v. Williams, 430 U.S. 387, 405 (1977);
Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
This Court in Edwards v. Arizona, 451 U.S.
477 (1981), summarized the voluntariness test
applied to waivers of right to counsel as
follows:

It is reasonably clear under our cases
that waivers of counsel must not only
be voluntary, but must also constitute
a knowing and intelligent
relinquishment or abandonment of a
known right or privilege, a matter
which depends in each case "upon the
particular facts and circumstances
surrounding that case, including the
background, experience, and conduct of
the accused."

Id. at 482. (citations omitted).

In Edwards, defendant asserted on the
evening of his arrest his right to counsel
and his right to remain silent. On the
following morning, the police, without first
furnishing him with counsel, interrogated
defendant and ultimately obtained
incriminating admissions. This Court, in
holding that the questioning by the police on
the following morning violated defendant's
rights under the Fifth and Fourteenth

Amendments, made clear that a bright-line rule applies with respect to an individual's right to counsel:

[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he had been advised of his rights. We further hold that an accused, . . . having expressed his desire to deal with the police only through counsel, [shall] not [be] subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id. at 485; see also Arizona v. Roberson, 486 U.S. 675 (1988); Fare v. Michael C., 442 U.S. 707 (1979) ("rigid rule that an accused's request for an attorney is per se an invocation of his fifth Amendment rights, requiring that all interrogation cease").

The trial court, by placing almost exclusive reliance on evidence that the State, through Sheriff McDowell, had finally obtained a waiver of Miranda rights, failed to give constitutionally adequate consideration to the facts and circumstances

surrounding the alleged waiver. Yet these are precisely the circumstances which demonstrate improper State action in this instance. This Court, recognizing the significance of prestatement police tactics, has stated:

[w]hatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation . . . before a statement is made is strong evidence that the accused did not waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so Moreover, any evidence that the accused was threatened, tricked or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege.

Miranda v. Arizona, 384 U.S. at 476.

This Court has repeatedly denounced in subsequent decisions tactics similar to those used by the State in this instance.

Moran v. Burbine, 475 U.S. 412 (1986) (waiver of Miranda rights must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception"); Berkemer v.

McCarty, 468 U.S. 420 (1984) ("The purposes of the safeguards prescribed by Miranda are to ensure that the police do not coerce or trick captive suspects into confessing."); see generally Miranda, 384 U.S. at 448-456.

Here, the State was unable to obtain Petitioner's waiver and confession for a period of twenty-four hours after he was taken into custody. During his initial custodial interrogation, he asserted his rights to remain silent and to counsel, resisting the State's efforts to obtain from him a signed waiver of rights form. Unsuccessful in their first night of efforts, the State switched to more deceptive tactics of custodial interrogation in an attempt to obtain a waiver. The State's use of Shirley Franklin, who was placed in handcuffs despite not being under arrest, in an attempt to obtain Petitioner's confession is the functional equivalent of custodial interrogation. In Rhode Island v. Innis, 446 U.S. 289 (1980), this Court stated the test

for determining custodial interrogation as follows:

any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect [constitute interrogation].

Id. at 301.

Unlike Innis,¹⁴ there is no innocent or casual explanation for the calculated tactics used by the State to obtain Petitioner's confession, and thus there is no basis for rejecting the instant petition. Rather, it is uncontroverted that the police, after Petitioner's assertion of his Miranda rights, continued their custodial interrogation of Petitioner after a limited break in time and without the presence of counsel. See Edwards v. Arizona, 451 U.S. at

¹⁴ In Innis, defendant, after asserting his Miranda rights, incriminated himself after a policeman made an innocuous comment to a fellow police officer which was overheard by defendant.

485, 486.¹⁵

Moreover, waiver and voluntariness were found although a further inference adverse to the State existed due to its failure to produce any witnesses to rebut Petitioner's testimony regarding the tactics used to extract the statement. The unexplained failure by a party to produce a witness who has peculiar knowledge of an event is valid grounds for an adverse inference against the nonproducing party. See Graves v. United States, 150 U.S. 115 (1893). Mere physical availability of a witness to the opposing party does not alter

¹⁵ Any factual claim that one officer did not know of Petitioner's assertion of his right to counsel moreover would be without merit. The state's knowledge regarding an accused's assertion of the right to counsel, as well as the right to remain silent, is imputed from one state officer to another. Michigan v. Jackson, 475 U.S. 625, 634 (1986) ("Sixth Amendment principles require that we impute the State's knowledge from one state actor to another."). See also Arizona v. Roberson, 486 U.S. 675 (1988) (rule extended to cover even subsequent interrogations conducted by different officers concerning a separate offense).

that negative inference "where the witness has a relationship with the opposing party 'that would in a pragmatic sense make his testimony unavailable to the opposing party regardless of physical availability.'"

United States v. Mahone, 537 F.2d 922, 926 (7th Cir. 1976) (citations omitted).¹⁶

Taken together, the actions by the State should have compelled the Alabama courts to conclude that Petitioner's waiver did not meet the test of voluntariness, which this Court recently reiterated:

"Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."

Arizona v. Fulminante, ___ U.S. ___, 111 S.

¹⁶ The Court in Mahone found that although the police officer whose absence gave rise to the adverse inference was outside the courtroom, he had a special relationship with the prosecution, arising out of his interest in seeing a conviction, such that he could not be considered "equally available" to the defense.

Ct. 1246, 1261 (1991). (citations omitted).

Petitioner submits that the Alabama courts have redefined the State's burden of proving waiver in a manner which violates his rights under the Fifth, Sixth and Fourteenth Amendments.

Petitioner also submits that the coercive conduct of the police destroyed any defense he had based in the facts of the case. It was thus only predictable that his reasonable anger was taken out on their accomplice, Shirley Franklin, at trial after the confession was admitted into evidence. In these circumstances, that subsequent trial testimony was in the truest sense possible "tainted" by the earlier coerced confession so as to render it constitutionally unreliable. Miranda, 384 U.S. at 314; see Wong Sun v. United States, 371 U.S. 471 (1963). It therefore should also be excluded from the evidence at a retrial of this

case.¹⁷

- C. The granting of certiorari in this case would not be a mere academic exercise since erroneous introduction of the involuntary confessions caused harm to petitioner's constitutional rights.

This Court has most recently held in Arizona v. Fulminante, ___ U.S. ___, 111 S.Ct. 1246 (1991), that the admission into evidence of an involuntary confession is subject to reversal if such evidence was in any way harmful to defendant. Recognizing the damning effect of a confession, this Court stated:

A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." (citations omitted) . . . While some statements by defendant may concern isolated aspects of the crime or may be

¹⁷ Likewise, the statement alleged by government investigator Larry Fowler to have been made by Petitioner immediately before Petitioner was to see his appointed counsel for the first time (approximately three days after he asserted his right to counsel) was improperly admitted. Such a statement, if made at all, violated both his right to counsel and his right to remain silent. Michigan v. Mosley, 423 U.S. 96, 105-106 (1975).

incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision.

Fulminante, 111 S. Ct. at 1257-1258. Given the profound impact of a confession on the jury, the State cannot claim that the involuntary confessions allowed into evidence were harmless to Petitioner beyond a reasonable doubt. See Chapman v. State of California, 386 U.S. 18 (1967) (federal constitutional error is harmless only if proven beyond a reasonable doubt).

Indeed, but for the confession, the State's case would have rested almost exclusively on the testimony of Petitioner's estranged girlfriend, a convicted felon who likely had a financial stake in the outcome of the trial because of rewards offered to solve the crime, and who the Sheriff's Department had recommended for the reward in writing after the trial. Such testimony standing alone thus would be highly suspect, as it should be, making the harm to

Petitioner of the admission of his coerced testimony severe. Thus, the granting of the petition in this case will additionally correct a wrong committed by the judicial system of Alabama.

CONCLUSION

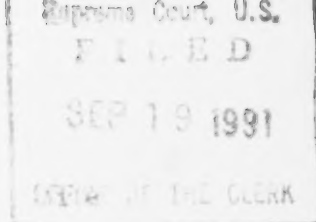
Michael Thompson respectfully requests that his petition for writ of certiorari be granted to review the important federal questions raised by this petition. The need to ensure that other criminal defendants in Alabama cease to suffer from the inherent wrong of grossly undercompensated counsel and underfunded defenses provides a compelling basis for the granting of this petition. Moreover, Petitioner submits that the facts underlying this petition demonstrate that there is a clear need to provide further guidance to courts throughout the United States as to the State's burden of demonstrating the lack of coercion throughout the custodial period,

thus providing a compelling independent
reason for the granting of this petition.

Respectfully submitted,

STEPHEN T. WAIMEY
Counsel of Record for
Petitioner Michael Eugene Thompson

91-559



No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MICHAEL EUGENE THOMPSON, Petitioner

v.

STATE OF ALABAMA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Michael Eugene Thompson

No. _____ 2

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DOCUMENT NUMBER 1



THE STATE OF ALABAMA ---- JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

June 21, 1991

1900927

Ex parte Michael Eugene Thompson

PETITION FOR WRIT OF CERTIORARI TO THE COURT
OF CRIMINAL APPEALS

(Re: Michael Eugene Thompson v. State)

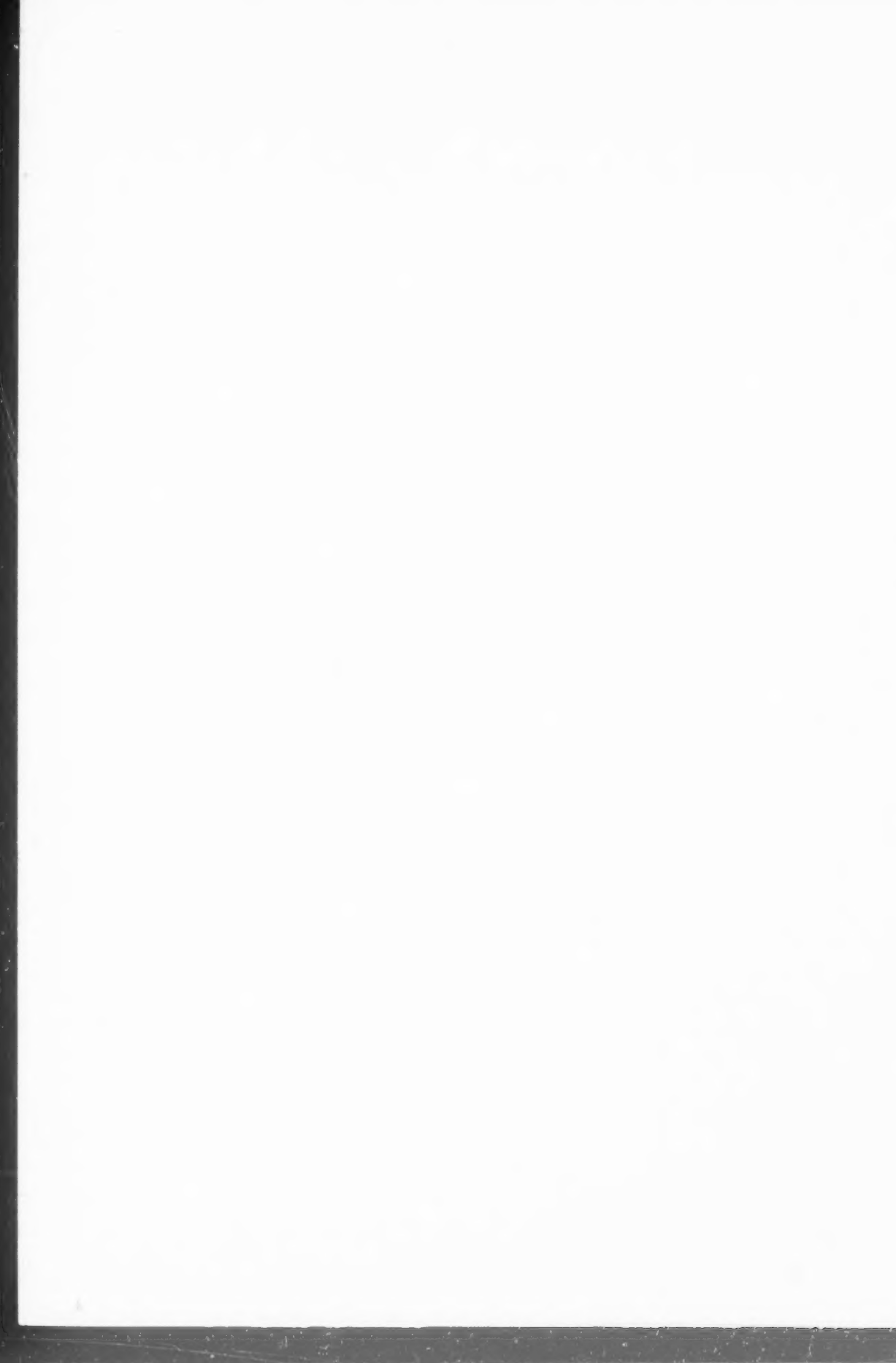
(CCA 89-833 (Blount CC-85-060.02))

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly
submitted, IT IS CONSIDERED AND ORDERED that
the petition for writ of certiorari is
denied.

ADAMS, J. - Hornsby, CJ., Almon,
Steagall and Ingram, JJ, concur.



Michael Eugene THOMPSON

v.

STATE.

CR 89-383.

Court of Criminal Appeals of Alabama.

Jan. 18, 1991.

Rehearing Denied March 1, 1991.

Certiorari Denied June 21, 1991

Alabama Supreme Court 1900927.

Stephen T. Waimey of LeBoeuf, Lamb,
Leiby & MacRae, Los Angeles, Cal., for
appellant.

Don Siegelman, Atty. Gen., and Sandra
J. Stewart, Asst. Atty. Gen., for appellee.

TYSON, Judge.

Michael Eugene Thompson appeals from
the denial of his petition seeking
post-conviction relief under Rule 20, Alabama
Temporary Rules of Criminal Procedure. The
petition was denied by the trial court after



a full evidentiary hearing, during which the appellant was represented by counsel.

The appellant was convicted of the capital murder of Maisie Gray. Maisie Gray was working in the Majik Mart store in Attalla, Alabama, on December 10, 1984. The appellant robbed and abducted Gray at gunpoint. He then forced her into a well and shot into the well several times. The cause of death was determined to be gunshot wounds.

This court affirmed the conviction in Thompson v. State, 503 So.2d 871 (Ala.Crim.App.1986). This court's opinion was affirmed in Ex parte Thompson, 503 So.2d 887 (Ala.1987), cert. denied, Thompson v. Alabama, 484 U.S. 872, 108 S.Ct. 204, 98 L.Ed.2d 155 (1987). Thompson then filed this petition seeking post-conviction relief in the Blount County Circuit Court. He raised eighteen issues in the petition, some of which contain multiple subparts. After an evidentiary hearing, the trial court made

express written findings of fact and conclusions of law. These findings and conclusions are herein adopted as Appendix A to this opinion and approved in this opinion.

The appellant asserted several issues in the post-conviction proceeding which were fully covered or dealt with, in whole or in part, in this court's original opinion reported in Thompson v. State, 503 So.2d 871 (Ala.Crim.App.1986).¹

¹ These issues, as they appear in appellant's brief, include:

"I. PETITIONER WAS DENIED A FAIR TRIAL AS A RESULT OF THE INTRODUCTION INTO EVIDENCE OF ALLEGED CONFESSIONS THAT, IF GIVEN AT ALL, WERE GIVEN INVOLUNTARILY, AND WITHOUT THE PRESENCE OF COUNSEL, IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND OF THE STATE CONSTITUTION AND LAWS OF ALABAMA

"A. The alleged confession was not proven to be voluntary, and thus should not have been admitted into evidence.

"B. The alleged confession was the result of coercive tactics designed to overbear the will of Petitioner, and thus was involuntary and should not have been admitted into evidence.

"....

"II. PETITIONER'S CONVICTION WAS OBTAINED BY THE UNCONSTITUTIONAL FAILURE OF THE PROSECUTION TO DISCLOSE TO THE PETITIONER EVIDENCE FAVORABLE TO THE PETITIONER

"A. The prosecution's failure to produce Shirley Franklin's criminal record prevented defense counsel from impeaching Shirley Franklin and establishing her lack of veracity.

"....

"XI. THE COURT IMPROPERLY CONSIDERED INADMISSIBLE EVIDENCE AT THE PENALTY STAGE IN VIOLATION OF MICHAEL THOMPSON'S RIGHTS

"XII. THE COURT IMPROPERLY FAILED TO WEIGH THE MITIGATING FACTORS OF MICHAEL THOMPSON'S CHRONIC ALCOHOL AND DRUG ABUSE AND EXTREME MENTAL DISTURBANCE AT THE PENALTY PHASE

"....

"XIV. THE TRIAL COURT'S FAILURE TO CONSIDER MICHAEL THOMPSON'S LACK

We completely adhere to the views heretofore expressed in the opinion of this court on the original appeal. Several of the appellant's claims, either in whole or in part, are procedurally barred from review because (1) they could have been raised at trial or on direct appeal but were not² or

OF SIGNIFICANT PRIOR CRIMINAL ACTIVITY AS A MITIGATING CIRCUMSTANCE WAS A VIOLATION OF ALABAMA LAW AND DEPRIVED MICHAEL THOMPSON OF HIS CONSTITUTIONAL RIGHTS"

² These claims, as they appear in appellant's brief, include:

"I. PETITIONER WAS DENIED A FAIR TRIAL AS A RESULT OF THE INTRODUCTION INTO EVIDENCE OF ALLEGED CONFESSIONS THAT, IF GIVEN AT ALL, WERE GIVEN INVOLUNTARILY, AND WITHOUT PRESENCE OF COUNSEL, IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND OF THE STATE CONSTITUTION AND LAWS OF ALABAMA

"....

"C. The alleged confession was obtained in violation of Petitioner's rights under the Fifth and Sixth Amendments to the United States Constitution, and thus should not have been admitted into evidence.

"D. The testimony given by
Petitioner at trial should not
have been admitted because it
was given only as a direct
result of the coercive and
improper tactics used to extract
the prior involuntary
confession, and thus was
'tainted fruit of the poisonous
tree.'

"....

"III. PETITIONER WAS DEPRIVED OF HIS RIGHT
TO A FAIR TRIAL BY THE CONFLICT OF
INTEREST RESULTING FROM HIS
COUNSEL'S PRIOR REPRESENTATION OF
THE KILLER OF THE PETITIONER'S
FATHER

"....

"VI. THE VICTIM'S DAUGHTER'S PARTICIPATION
IN THE PROSECUTION OF PETITIONER WAS
HIGHLY IMPROPER AND DENIED PETITIONER
A FAIR TRIAL AND DUE PROCESS

"VII. THE PROSECUTOR'S MISCONDUCT AND
ARGUMENTS AT TRIAL AND AT
PETITIONER'S SENTENCING HEARING
BEFORE THE JURY AND BEFORE THE JUDGE
WERE IMPROPER AND VIOLATED RIGHTS
GUARANTEED BY THE FIFTH, SIXTH,
EIGHTH AND FOURTEENTH AMENDMENTS TO
THE UNITED STATES CONSTITUTION AND
THE STATE CONSTITUTION AND THE LAWS
OF ALABAMA

"VIII. THE COURT'S FAILURE TO GIVE A JURY
INSTRUCTION ON A LESSER INCLUDED
OFFENSE WHERE THE EVIDENCE WOULD HAVE
SUPPORTED SUCH A VERDICT DEPRIVED
PETITIONER OF A FUNDAMENTALLY FAIR

(2) they were raised at trial but not on appeal.³ Other of the appellant's claims are

TRIAL IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND LAWS OF ALABAMA

"IX. THE COURT'S INSTRUCTIONS TO THE JURY VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL

"X. THE COURT IMPROPERLY INSTRUCTED THE JURY THAT IT'S VERDICT AT THE PENALTY STAGE WAS MERELY ADVISORY, THEREBY DENYING MICHAEL THOMPSON A FAIR TRIAL, DUE PROCESS AND OTHER CONSTITUTIONAL RIGHTS

"....

"XV. THE ALABAMA DEATH PENALTY STATUTE'S "ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL" AGGRAVATING CIRCUMSTANCE IS UNCONSTITUTIONALLY VAGUE ON ITS FACE, AS INTERPRETED BY ALABAMA COURTS AND AS APPLIED TO MICHAEL THOMPSON

"XVI. CERTAIN OTHER ASPECTS OF THE ALABAMA DEATH PENALTY SCHEME, AS INTERPRETED BY ALABAMA COURTS, VIOLATE THE UNITED STATES AND ALABAMA CONSTITUTIONS"

³ These claims, as they appear in appellant's brief, include:

"XIII. THE PRE-TRIAL PUBLICITY GENERATED PREJUDICED THE COMMUNITY AND THUS THE JURY AGAINST MICHAEL THOMPSON. THEREFORE, THE COURT'S REFUSAL TO CHANGE VENUE, ALLOW INDIVIDUALIZED VOIR DIRE OR EXCLUDE JURORS WHO HAD

procedurally barred from review because they were not raised in his Rule 20 petition."

**BEEN SUBJECTED TO SUCH PUBLICITY WAS
CONSTITUTIONALLY IMPROPER**

"A. The pretrial publicity generated by the alleged crime mandated a change of venue.

"B. The trial court improperly refused to allow Michael Thompson's counsel to conduct individualized voir dire of the jury panel regarding their exposure to prejudicial material.

"C. The trial court's refusal to dismiss those prospective jurors who had indicated that they had been exposed to pretrial publicity was improper and a violation of Michael Thompson's right to a fair trial.

"....

"XVII. THE TRIAL COURT IMPROPERLY REFUSED TO ALLOW INDIVIDUAL, SEQUESTERED VOIR DIRE OF PROSPECTIVE JURORS WITH RESPECT TO THEIR BELIEFS ABOUT THE DEATH PENALTY

"XVIII. THE TRIAL COURT'S EXCUSAL OF CERTAIN PROSPECTIVE JURORS WAS IMPROPER AND VIOLATED MICHAEL THOMPSON'S RIGHT TO A FAIR TRIAL"

" These claims, as they appear in appellant's brief, include:

"V. PETITIONER'S CONVICTION WAS OBTAINED BY THE UNCONSTITUTIONAL FAILURE OF

See e.g., Jackson v. State, 501 So.2d 542 (Ala.Crim.App.1986), cert. denied, 483 U.S. 1010, 107 S.Ct. 3242, 97 L.Ed.2d 746 (1987); Boatwright v. State, 494 So.2d 929 (Ala.Crim.App.1986). The appellant apparently argues that this court should apply the "plain error" rule in order to review those claims that are procedurally barred because the claims are barred because his counsel was constitutionally ineffective.

THE PROSECUTION TO DISCLOSE TO THE
PETITIONER EVIDENCE FAVORABLE TO THE
PETITIONER

"....

"D. The prosecution's failure to disclose Michael Thompson's refusal to waive his Fifth and Sixth Amendment rights creates a reasonable doubt as to Michael Thompson's guilt or sentence;

"....

"XI. THE COURT IMPROPERLY CONSIDERED INADMISSIBLE EVIDENCE AT THE PENALTY STAGE IN VIOLATION OF MICHAEL THOMPSON'S RIGHTS [to the extent he argues that the trial court considered statements other than in the pre-sentence report regarding other crimes committed by the defendant]"

We need not address this argument, because counsel was not ineffective.

In addition to the claims that are procedurally barred and the claim of ineffective assistance of counsel at both the trial and appeal stages, the appellant also claims that the State failed to provide him with exculpatory evidence.

I

We have carefully considered the appellant's assertions with reference to his representation by counsel. We conclude that he failed to show either inadequate or ineffective representation by counsel at trial or on original appeal. The appellant failed to satisfy either prong of the test set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See also Baldwin v. State, 539 So.2d 1103 (Ala.Crim.App.1988).

A review of the record leads us to conclude that the circuit court's findings of fact and conclusions of law are correct and

are fully supported by the record. We also note that the appellant was fully and fairly represented not only at his original trial and on original appeal but also at the Rule 20 petition hearing and in his appeal of that proceeding, which is presently before this court.

II

The appellant also contends that the State failed to provide him with exculpatory evidence or evidence that could be used to impeach the State's key witness.

A

The appellant contends that the State failed to inform him that Shirley Franklin was granted immunity from prosecution in exchange for her testimony against him and that it failed to provide him with a statement made to the police by Shirley Franklin. This argument has no merit. There was absolutely no evidence presented at the hearing that Shirley Franklin was granted immunity from prosecution. In fact, the only

evidence as to this claim was to the contrary. Furthermore, the appellant's trial attorney testified that, although he was not given a copy of Shirley Franklin's statement, he was allowed to listen to and copy a taped statement given by Shirley Franklin. There was absolutely no testimony presented that Shirley Franklin received a promise of payment or reward for her testimony.

B

The appellant also contends that the State withheld exculpatory evidence based on statements by Jack Lee Roberts, who said he saw a man in the Majik Mart shortly before Maisie Gray disappeared. The appellant contends that the trial court erred by applying the improper legal standard to determine the materiality of the alleged exculpatory evidence. He contends that the trial court erred in finding that the evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of

this proceeding would have been different." (C.R. 243). The appellant bases this argument on a statement made by the Alabama Supreme Court in Ex parte Womack, 541 So.2d 47 (Ala.1988). In that case, the court noted that Part III of United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), was not the opinion of the United States Supreme Court, but of only one Justice. He further contends that the correct test of materiality is whether the evidence "might have affected the outcome of the trial." Womack at 64 (quoting, United States v. Agurs, 427 U.S. 97, 104, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976)).

A review of Bagley reveals, however, that the majority of the court held that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 473 U.S. at 682, 685, 105 S.Ct. at 3383,

3385. One concurring Justice, with whom two other Justices concurred, stated:

"As the Justice correctly observes, this standard is 'sufficiently flexible' to cover all instances of prosecutorial failure to disclose evidence favorable to the accused. Ibid. Given the flexibility of the standard and the inherently fact-bound nature of the cases to which it will be applied, however, I see no reason to attempt to elaborate on the relevance to the inquiry of the specificity of the defense's request for disclosure, either generally or with respect to this case. I would simply hold that the proper standard is one of reasonable probability...."

Id. at 685, 105 S.Ct. at 3385. Thus, a majority of the Court upheld the "reasonable probability" standard. The concurring Justices simply stated that the Court need not address the specificity of the defense's request. This interpretation is further supported by Pennsylvania v. Ritchie, 480 U.S. 39, 57, 107 S.Ct. 989, 1001, 94 L.Ed.2d 40 (1987), which states:

"Although courts have used different terminologies to define 'materiality,' a majority of this court has agreed, '[e]vidence is material only if there is a reasonable probability that, had the

evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.' United States v. Bagley, supra, 473 U.S., at 682, 105 S.Ct., at 3384 (opinion of Blackmun, J.), see id. at 685, 105 S.Ct., at 3385 (opinion of White, J.)" (Emphasis added.)

We affirm the trial court's determination that the alleged exculpatory evidence was no material and find that the trial court applied the correct legal standard in reaching its conclusion. See, e.g., Bradley v. State, 557 So.2d 1339, 1342-43 (Ala.Crim.App.1989) for another Alabama case applying the same standard to Brady claims. Furthermore, we note that the allegedly exculpatory evidence is also not material under the "might have affected the outcome" test proposed by the appellant. The appellant also failed to show the favorable character of the suppressed evidence for the defense as to his Brady claims. See Bradley.

We have carefully reviewed the allegations and legal arguments in support of this appeal

and find no error. For the reasons stated herein, the judgment of the Blount County Circuit Court denying the appellant's Rule 20 petition is due to be, and it hereby is, affirmed.

AFFIRMED.

All the Judges concur.

APPENDIX A

IN THE CIRCUIT COURT OF BLOUNT COUNTY, ALABAMA

MICHAEL EUGENE THOMPSON, Petitioner,

v.

STATE OF ALABAMA, Respondent,

Case No. CC-85-060.02

Filed Feb. 15, 1990

OPINION AND ORDER

THE APPENDIX TO THE OPINION OF THE COURT OF
CRIMINAL APPEALS IS REPRODUCED HEREIN AS
DOCUMENT NUMBER 3.

DOCUMENT NUMBER 3

IN THE CIRCUIT COURT OF BLOUNT COUNTY, ALABAMA

MICHAEL EUGENE THOMPSON, Petitioner,

v.

STATE OF ALABAMA, Respondent,

Case No. CC-85-060.02

Filed Feb. 15, 1990

OPINION AND ORDER

Based on the evidence presented at trial and the evidentiary hearing on the above-styled petition for relief from conviction or sentence, the Court enters the following findings of fact and conclusions of law:

PROCEDURALLY BARRED CLAIMS

A. Claims Which Were Raised On Appeal

Four of the claims contained in the amended petition, in whole or in part, were raised and addressed on appeal from Thompson's conviction and death sentence:

Claim I -- "Petitioner's conviction was obtained by the unconstitutional failure of the prosecution to disclose to the petitioner evidence favorable to the

petitioner [insofar as it alleges that the State failed to disclose Shirley Franklin's criminal record]."

Claim II -- "Petitioner was denied a fair trial as a result of the introduction into evidence of alleged confessions that, if given at all, were given by petitioner involuntarily, and without the presence of counsel, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and of the state constitution and laws of the State of Alabama [insofar as it alleges that petitioner's confessions were coerced or otherwise involuntary]."

Claim XVI -- "The Court improperly considered inadmissible evidence presented at the sentencing hearing in violation of petitioner's rights."

Claim XVII -- "Petitioner's death sentence was imposed without the constitutionally required consideration of chronic alcohol and drug abuse and extreme mental disturbance as mitigating circumstances."

See, Thompson v. State, 503 So.2d 871, 875-876, 877-878, 880-882 (Ala.Cr.App.1986), aff'd, 503 So.2d 887 (Ala.), cert. denied [484 U.S. 872], 108 S.Ct. 204 [98 L.Ed.2d

155] (1987). Claims which were raised on appeal are barred from further review. Temporary Rule 20.2(a)(4), Alabama Rules of Criminal Procedure; Ex Parte Rudolph, 276 Ala. 392, 393, 162 So.2d 486 (1964); Richardson v. State, 419 So.2d 289 (Ala.Cr.App.), cert. denied, No. 81-937 (Ala.1982); Summers v. State, 366 So.2d 336, 340 (Ala.Cr.App.1978), cert. denied, 366 So.2d 346 (Ala.1979).

B. Claims Which Could Have Been But Were Not Raised at Trial

Eleven of the claims contained in the amended petition, in whole or in part, could have been raised at trial, and then on appeal, but were not:

Claim II -- "Petitioner was denied a fair trial as a result of the introduction into evidence of alleged confessions that, if given at all, were given by petitioner involuntarily, and without the presence of counsel, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and of the state constitution and laws of Alabama [insofar as it is

based on allegations involving Shirley Franklin]."

Claim III -- "Petitioner was deprived of a fair trial as a result of his attorney's conflict of interest resulting from his prior representation of petitioner's father's killer."

Claim VI -- "Petitioner was deprived of an impartial jury through improper juror exclusion in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution [insofar as it pertains to jurors who were excused without objection by defense counsel]."

Claim IX -- "The victim's daughter's participation in the prosecution of petitioner was highly improper and denied petitioner a fair trial and due process."

Claim X -- "The prosecutors' misconduct and arguments at trial and at petitioner's sentencing hearing before the jury and before the judge were improper and violated rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the state constitution and laws of Alabama."

Claim XI -- "The Court's failure to give a jury

instruction on a lesser included offense where the evidence would have supported such a verdict deprived petitioner of a fundamentally fair trial in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the state constitution and laws of Alabama."

Claim XII -- "The Court's instructions to the jury violated petitioner's constitutional right to a fair trial."

Claim XIII -- "The Court's instructions to the jury at the penalty phase to the effect that the jury's verdict was merely advisory deprived petitioner of a fundamentally fair trial and due process, and constituted a violation of petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the state constitution of Alabama."

Claim XIV -- "Alabama's application of the 'especially heinous, atrocious and cruel' aggravating circumstance is unconstitutionally vague and as applied to petitioner's case violates due process and the prohibition against cruel and unusual punishment."

Claim XV -- "The Alabama death penalty statute, § 13A-5-45 et seq., as implemented by the courts of Alabama and applied in this case, is unconstitutional."

Claim XVIII -- "Petitioner's death sentence was imposed in violation of the Eighth and Fourteenth Amendments to the United States Constitution and the state constitution and laws of Alabama because it was based upon aggravating circumstances that merely duplicated elements of the crime of capital murder and because the Alabama statutory scheme does not allow for a meaningful independent review of the sentencing judge."

Claims which could have been raised at trial, by objection or motion, and then on direct appeal but were not are barred from further review. Temporary Rule 20.2(a)(3) & (5), Alabama Rules of Criminal Procedure; Ex Parte Ellison, 410 So.2d 130, 132 (Ala.1982); Jackson v. State, 501 So.2d 542, 544 (Ala.Cr.App.1986), cert. denied, No. 86-269 (Ala.1987); Magwood v. State, 449 So.2d 1267, 1268 (Ala.Cr.App.), cert. denied, No. 83-1143 (Ala.1984).

C. Claims Which Were Raised At
Trial But Not On Appeal

Four of the claims contained in the amended petition, in whole or in part, were raised at trial but not on appeal:

Claim V -- "Petitioner's rights to a fair trial by an impartial jury under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated by the Court's failure to grant a change of venue."

Claim VI -- "Petitioner was deprived of an impartial jury through improper juror exclusion in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution [insofar as it pertains to jurors who were excused over objection by defense counsel at trial]."

Claim VII -- "Petitioner was deprived of an impartial jury through improper juror inclusion in violation of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution."

Claim VIII -- "Petitioner's rights to a fair trial by an impartial jury were violated by the Court's restrictions on the voir dire examinations of prospective jurors."

While each of these claims were raised at trial, none was raised on appeal. See, Thompson v. State, 503 So.2d 871 (Ala.Cr.App.1986), aff'd, 503 So.2d 887 (Ala.), cert. denied [484 U.S. 872], 108 S.Ct. 204 [98 L.Ed.2d 155] (1987). Claims which could have been but were not raised on appeal are barred from further review. Temporary Rule 20.2(a)(5), Alabama Rules of Criminal Procedure; Ex Parte Rudolph, supra; Bass v. State, 417 So.2d 582, 584 (Ala.Cr.App.), cert. denied, 417 So.2d 588 (Ala.1982); Summers v. State, 366 So.2d 336, 340 (Ala.Cr.App.1978), cert. denied, 366 So.2d 346 (Ala. 1979).

EXCULPATORY EVIDENCE

In Claim I of the amended petition, Thompson alleged that the prosecution withheld material exculpatory evidence in four instances:

1. a promise of immunity from prosecution for Shirley Franklin;
2. payment or promise of a reward to Shirley Franklin or Gary Franklin;

3. a witness who described a person and automobile he saw at the robbery and abduction scene which allegedly did not match Thompson's appearance and automobile; and
4. the untimely disclosure of Shirley Franklin's criminal record at trial.

As noted above, this fourth allegation is barred from consideration here because it was raised and addressed on appeal from Thompson's conviction and death sentence. As to the remaining three allegations, Thompson is not entitled to relief because this claim lacks merit.

A. Legal Standard

In Brady v. Maryland, 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215] (1963), the Supreme Court required the prosecution to disclose evidence in its possession which was both favorable to a defendant and material to deciding guilt or punishment. United States v. Bagley, 473 U.S. 667, 674 [105 S.Ct. 3375, 3379, 87 L.Ed.2d 481] (1985). In Bagley, the Court noted that the non-disclosure of favorable evidence "amounts to a

constitutional violation only if it deprives the defendant of a fair trial." Id., at 678 [105 S.Ct. at 3381]. A new trial must occur "only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." Id.

The Court then announced the standard to be used in determining whether undisclosed exculpatory evidence was material:

We find the Strickland formulation of the Agurs test for materiality sufficiently flexible to cover the "no request," "general request" and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Id., at 682 [105 S.Ct. at 3383]. As to each of these three allegations, Thompson has failed to establish that he is entitled to relief.

B. Immunity

At the three-day evidentiary hearing in this case, Thompson presented no evidence to show that Shirley Franklin was promised or received immunity from prosecution. Because Thompson has not proved any immunity agreement existed, he has not proved that exculpatory evidence existed to be withheld. Because Thompson has not proved any immunity agreement existed, he has not proved a reasonable probability that, but for the non-disclosure of such an agreement, he would not have been convicted or sentenced to death. This allegation is without merit.

C. Rewards

The testimony and exhibits at the hearing established that, after Thompson was convicted and sentenced to death, M.L. Carter, the chief investigator for the Etowah County Sheriff's Office, recommended that Gary Franklin receive a reward for his actions. Defendant's Exhibit 16. According to Chief Carter, Gary Franklin received a one

thousand dollar (\$1,000.00) reward from the Munford Corporation. Chief Carter wrote this letter because, after Thompson was convicted, he thought Gary Franklin deserved the reward. Chief Carter thought Gary Franklin was entitled to the reward because he had contacted the police while Shirley Franklin had not.

Chief Carter never discussed any reward before this letter with Gary Franklin or Shirley Franklin and he never heard either of them mention any reward. Thompson presented no evidence showing that either Shirley Franklin or Gary Franklin knew about any reward before or during Thompson's trial. Thompson presented no evidence showing that either Shirley Franklin or Gary Franklin were promised any reward before or during Thompson's trial. While, almost a year after Thompson's trial, Etowah County Sheriff McDowell wrote a letter recommending that Shirley Franklin receive a reward, Defendant's Exhibit 17, this letter does not

show that Shirley Franklin had been promised or knew of any reward at the time of trial. From all that the evidence before this Court shows, Shirley Franklin was not promised a reward before or during trial and never received any reward, even though she attempted to obtain one almost a year after Thompson's trial.

The evidence presented by Thompson does not show that a promise to pay or payment of a reward existed at trial such as would have constituted impeaching evidence to be disclosed. Further, no reward was ever paid to a witness against Thompson since the only reward proved was paid to Gary Franklin. Given Chief Carter's testimony, this payment to Gary Franklin was not a ruse or attempt to disguise a payment to Shirley Franklin but rather was made to the person who contacted the police with information about Mrs. Gray's murder. Therefore, Thompson has failed to prove that exculpatory evidence existed at trial to be withheld.

Additionally, there is no reasonable probability that, had Shirley Franklin been shown to be aware of or promised a reward and had such knowledge or promise been used in cross-examining her, the outcome of Thompson's trial would have been different. Shirley Franklin's account of Thompson's actions and statements on the night of the murder were consistent throughout the investigation and trial. Further, her testimony was fully corroborated by Thompson's confessions.

For these reasons, this allegation too lacks merit.

D. Jack Lee Roberts

During their investigation of this crime, Attalla police detectives interviewed Jack Lee Roberts, who had been in the store where Mrs. Gray worked on the night she was murdered. He gave them a description of a man he saw there and also an automobile. Defendant's Exhibit 8. This statement was given to Thompson's lawyers in response to

their discovery motion before trial.

Defendant's Exhibits 24, 26, and 27. Roberts also assisted in developing a composite sketch of the person he saw in the store. Defendant's Exhibits 4 and 4a.

Roberts was later hypnotized. A tape recording of Roberts' interview under hypnosis, Defendant's Exhibit 5, and an Attalla police report and notice, Defendant's Exhibits 2 and 3, respectively, were not provided to Thompson's trial lawyers.

Based on the testimony at trial and the hearing on this petition, it is clear that the prosecution did not withhold material exculpatory evidence as to Roberts. At the time of trial, Thompson had given two versions of the crime, one in which he robbed, abducted and murdered Mrs. Gray, and another in which he robbed and abducted Mrs. Gray but Shirley Franklin killed her. Given these stories, nothing in any of the Roberts information was helpful since Thompson admitted being at the store. Therefore, the

Roberts information was not exculpatory. Further, the existence of Roberts and his descriptions of the man and automobile were not withheld by the prosecution. At the hearing on this petition, Thompson established that the primary statement of Roberts to the Attalla police was in fact given to his trial lawyers. While additional information existed in police files, that additional information does not materially add to the value of Roberts as a source of exculpatory evidence. The prosecution clearly notified the defense of Roberts' existence and the nature of his information when it produced his statement, Defendant's Exhibit 8. Therefore, the Roberts information was not withheld.

Finally, the Roberts information, even taken as a whole, is clearly not material. Given Thompson's admission to his lawyers that he abducted Mrs. Gray and his trial testimony to the same effect, there is no reasonable probability that, but for the

failure to produce the information obtained from Roberts, Thompson would not have been convicted and sentenced to death. Until the hearing on this petition, Thompson had never denied being at the store and abducting Mrs. Gray.

Given Thompson's statements to his lawyers before the trial and his trial testimony, there was no reason to believe that Roberts' information was helpful. In fact, as noted by B.J. McPherson, the composite sketch developed by Roberts resembles Thompson. That sketch, Defendant's Exhibits 4 and 4a, much more closely resembles Thompson, as shown in State's Exhibit 2, than it does Ricky Pope, as shown in State's Exhibit 3, whom Thompson now claims robbed, abducted, and murdered Mrs. Gray. Thus, it appears that Roberts saw Thompson at the store, which fact hardly exculpates Thompson.

Finally, this evidence is not material because Thompson's latest version of the events on the night of the murder is false.

The Court has observed Thompson's demeanor both at trial and at the hearing on this petition and he is not a credible witness. The Court credits Thompson's confessions as being the most accurate versions of his actions. Thompson, who admits telling lies under oath at his trial, now says that the real version of what happened is that Ricky Pope was the guilty party. However, Pope, as shown by both his photograph and physical description on State's Exhibit 3, cannot be and is not the man described by Roberts. Therefore, there is no reasonable probability that, but for the absence of all the information from Roberts about what he saw, the outcome of Thompson's trial would have been different. This allegation lacks merit. There is no reason to believe that if Thompson had had all of the Roberts information he would have selected a different story to tell at trial. Further, even if he had selected his current story, there is no reasonable probability of a

different result because that story is false and would have been proven to be false at trial.

INEFFECTIVE ASSISTANCE OF COUNSEL

A. Legal Standard

Ineffective assistance of counsel claims are governed by the United States Supreme Court's decision in Strickland v. Washington, 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674] (1984). After recognizing that the benchmark for judging any claim of ineffectiveness must be "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result," the Supreme Court announced in Strickland that there were two components to an ineffective assistance of counsel claim:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that

the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id., at 687 [104 S.Ct. at 2064]. The Court held that the proper standard for attorney performance is an objective one: "simply reasonableness under prevailing professional norms." Id., at 688 [104 S.Ct. at 2065]. The Supreme Court held that:

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134 [102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783] (1982). A fair assessment of

attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. New York [Louisiana], supra, 350 U.S. [91] at 101 [76 S.Ct. 158, 164, 100 L.Ed. 83 (1955)]. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See Goodpastor, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 343 (1983).

Id., at 689-690 [104 S.Ct. at 2065-2066] (emphasis added). After a petitioner has identified the specific acts or omissions which he alleges were not the result of

reasonable professional judgment, the court must determine whether those acts are "outside the wide range of professionally competent assistance." Id., at 690 [104 S.Ct. at 2066]. In making this determination, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (emphasis added). The Supreme Court said that courts must also recognize that strategic choices made after reasonable investigation are virtually unchallengeable, and the reasonableness of a counsel's actions may be determined or substantially influenced by what the defendant has told him. Id.

Even when a counsel's performance is outside the wide range of professional reasonableness, the judgment in question is not to be set aside unless the petitioner affirmatively proves prejudice. Id., at 691-693 [104 S.Ct. at 2066-2068]. It is not enough that a defendant "show that the errors

had some conceivable effect on the outcome of the proceeding." Id., at 693 [104 S.Ct. at 2067]. Instead:

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id., at 694 [104 S.Ct. at 2068] (emphasis added). More specifically, the Supreme Court held:

When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id., at 695 [104 S.Ct. at 2068-2069]. In making a prejudice determination, the totality of the evidence that was before the judge must be considered.

Three additional Supreme Court decisions have a bearing on evaluating Thompson's ineffective assistance of counsel claims.

The First is Engle v. Isaac, 456 U.S. 107 [102 S.Ct. 1558, 71 L.Ed.2d 783] (1982), in which the Supreme Court held:

Every trial permits a myriad of possible claims. Counsel might have overlooked or chosen to omit respondent's due process argument while pursuing other avenues of defense. We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim, ...

Id., at 133-134 [102 S.Ct. at 1575] (emphasis added).

The second is United States v. Cronin, 466 U.S. 648 [104 S.Ct. 2039, 80 L.Ed.2d 657] (1984), in which the Supreme Court held:

The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted--even if defense counsel may have made demonstrable errors--the kind of testing envisioned by the Sixth Amendment has occurred. ...

Id., at 656 [104 S.Ct. at 2045] (footnotes omitted). The Cronic decision also held that: "[b]ecause we presume that the lawyer is competent to provide the guiding hand that the defendant needs ... the burden rests on the accused to demonstrate a constitutional violation." Id., at 658 [104 S.Ct. at 2046] (footnote omitted) (emphasis added).

The third Supreme Court decision is Smith v. Murray [477 U.S. 527], 106 S.Ct. 2261 [2661, 91 L.Ed.2d 434] (1986). In that case, the Court recognized that the process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail is the hallmark of effective appellate advocacy. Id. [106 S.Ct.] at 2667. The Court concluded:

It will often be the case
that even the most informed

counsel will fail to anticipate a state appellate court's willingness to reconsider a prior holding or will underestimate the likelihood that a federal habeas court will repudiate an established state rule. But, as Strickland v. Washington made clear, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S., at 689, 104 S.Ct., at 2065. Viewed in light of Virginia law at the time Mr. Pugh submitted his opening brief to the Supreme Court of Virginia, the decision not to pursue his objection to the admission of Dr. Piles' testimony fell well within the "wide range of professionally competent assistance" required under the Sixth Amendment to the Federal Constitution. Id. [466 U.S.], at 690, 104 S.Ct., at 2066.

Id.

B. Thompson's Trial and Appellate Counsel

Thompson was represented at his 1985 capital murder trial and on appeal through

the Alabama Supreme Court by B.J. McPherson and John Dobson. Both were appointed to represent Thompson by this Court. Both McPherson and Dobson are and were at the time of Thompson's trial experienced and competent trial attorneys.

B.J. McPherson is and was at the time of Thompson's 1985 capital murder trial in private practice in Blount County, Alabama, and had been since he was admitted to practice in 1969. At the time of Thompson's trial, 25 to 30 percent of his practice was criminal defense work; he had tried 150 to 200 felony cases; including ten or eleven murder cases.

John Dobson is currently a District Court Judge for the 30th Judicial Circuit which includes Blount County, Alabama. At the time of Thompson's trial, he was an attorney in private practice in Blount County and had been since 1976. His practice was 20 to 25 percent criminal defense work and he had been involved in and tried felony cases, although

he had not been involved in any capital murder trials.

Prior to the trial of this case, Thompson's attorneys met with him for more than 20 hours. During some weeks they met with him daily, especially close to trial. Thompson's attorneys also undertook a great deal of investigation and research into the legal issues in this case. Based on conversations with Thompson, the fact that Thompson had confessed, and on the results of the psychiatric examinations, Thompson's trial counsel developed a trial strategy that involved a theory of lesser culpability and putting the State to its burden of proof.

This Court had the opportunity to observe both trial counsel when they testified at the evidentiary hearing in this case and finds that both John Dobson and B.J. McPherson were credible witnesses.

C. Specific Claims

In his Rule 20 petition, Thompson raised twenty-four claims of ineffective assistance

of counsel. At the evidentiary hearing held on May 23, 24, and 25, 1989, Thompson called fourteen witnesses including both of Thompson's trial attorneys, John Dobson and B.J. McPherson. He also introduced 30 exhibits. The State called two witnesses and re-called John Dobson. The State also introduced 3 exhibits. Having considered all the evidence, the Court makes the following findings:

1. Allegations that trial counsel failed to adequately communicate with and advise Thompson

In paragraph 19(a), Thompson alleged that Dobson and McPherson failed to adequately communicate with him before, during, and after trial. This allegation is contradicted by the evidence at the Rule 20 evidentiary hearing.

Prior to trial, McPherson and Dobson met with Thompson extensively. In those meetings with Thompson, his trial attorneys discussed trial strategy and his defense with him. Trial procedures were also discussed with

Thompson. State's Exhibit 1, which is a transcript of a conversation between Thompson and his attorneys prior to Thompson's trial, which was taped by trial counsel, reveals that defense decisions were discussed with Thompson. For example, trial counsel discussed with Thompson whether he wanted his statement of the events surrounding the crime, as given to his attorneys, turned over to the sheriff's office. It also reveals that trial counsel explained to Thompson the possible consequences of turning over that statement, which incriminated Shirley Franklin.

The transcript reveals that Thompson's version of the events on the night of the crime were discussed with him in detail; a description given by a witness who was on the scene prior to the victim being reported missing was discussed with him; and, the various motions to be filed were discussed with him. State's Exhibit 1 also reveals that a possible insanity or diminished

capacity defense was discussed with Thompson and the procedures required to establish such a defense were explained and discussed with Thompson.

In addition, McPherson and Dobson testified that they met and discussed the trial and Thompson's defense during trial, each morning before trial began, and each evening after proceedings were adjourned. This Court finds that the testimony of John Dobson and B.J. McPherson that they communicated with Thompson regarding his defense and trial procedures is credible, and that Thompson's testimony to the contrary is not credible. The evidence reveals that trial counsel were very conscientious in their communication with Thompson and in advising him of trial procedures. Thompson has failed to establish that his trial counsel's performance was deficient in their communication with Thompson.

Thompson has also failed to establish that he was prejudiced by any failure of his trial

counsel to communicate with him. Thompson presented no evidence that his trial counsel failed to communicate anything to him that would have made a difference in the outcome of his trial. Thompson did not prove a reasonable probability that, but for trial counsel's failure to communicate some information to him, the outcome of his trial would have been different. Strickland v. Washington, 466 U.S. at 694 [104 S.Ct. at 2068].

Thompson also has not shown that his trial counsel failed to competently advise him or gave him erroneous advice as to the charges pending against him; the defense strategy; the effect of having Thompson testify during the guilt phase of the trial; the effect of not having Thompson testify before the jury during the penalty phase of the trial; the effect of not having Thompson's mother testify before the judge immediately prior to sentencing; or the effect of failing to adequately prepare for the penalty phase of

the trial. These claims are contained in paragraph 19(c).

Thompson presented no evidence that his trial counsel failed to advise, or erroneously advised, Thompson that he was charged with the capital murder of Maisie Carlene Gray, and of the possible consequences of that charge. He has therefore failed to demonstrate that trial counsel's performance was deficient as to this claim.

Trial counsel thoroughly advised and discussed defense strategy with Thompson, including a possible insanity defense as is reflected in State's Exhibit 1. The trial attorneys also explained the difficulty in defending the version of the crime he gave them, considering the fact that he had given a different version in his confessions. Thompson has not demonstrated that his trial counsel's performance was deficient as to this claim.

Trial counsel were also very diligent in explaining to Thompson the effect of his testifying during the guilt phase of the trial. Again, this is reflected in State's Exhibit 1. Trial counsel explained the problems and possible consequences of Thompson telling a different story in court than he told in his confession. After explaining to Thompson that he had the right to testify or not to testify, trial counsel advised Thompson to take the stand and testify at the guilt stage of the trial. This advice was reasonable in light of Thompson's wanting the jury to disregard his confession to law enforcement officers; believe that he gave them that story in order to protect his girlfriend, Shirley Franklin; and that it really was Shirley Franklin who actually shot and killed Mrs. Gray. Thompson has failed to demonstrate that his trial counsel's performance was deficient as to this claim.

This Court finds that trial counsel did advise Thompson as to the importance of his testifying before the jury during the penalty phase of the trial and the possible effects of his not testifying. Trial counsel advised Thompson to testify at the penalty phase but he refused, telling his trial counsel he "wasn't going to get on the stand and beg those bastards for anything." The trial record also reflects that Thompson was advised of his right to testify and that he did not want to. Thompson's assertions to the contrary are not credible. Thompson has failed to demonstrate that his trial counsel's performance was deficient as to this claim.

Thompson presented no evidence on his claim that his trial counsel failed to competently advise him or gave him erroneous advice regarding the effect of not having his mother testify before this Court immediately prior to sentencing. There is no evidence therefore that his counsel's performance was

deficient as to this claim. Furthermore, there was no prejudice from the failure of the mother to testify immediately prior to sentencing. This Court is the same court that heard evidence at both the guilt and penalty stages in the 1985 trial of this case. Thompson's mother, Joyce Parker, testified at the penalty phase of this case as to Thompson's drug and alcohol problems and asked the jury for mercy. This Court heard that testimony and had Mrs. Parker also testified after the jury's recommendation and prior to sentencing before this Court, the sentence imposed would have been the same. Therefore, there is no prejudice from any failure on trial counsel's part to advise Thompson of the effects of his mother taking the stand immediately prior to sentencing.

Thompson presented no evidence that his trial counsel failed to advise, or erroneously advised, Thompson of the effect of failing to adequately prepare for the penalty phase of the trial. He has therefore

not shown his trial counsel's performance was deficient. Further, trial counsel did in fact adequately prepare for the penalty phase, see pp. 1233-1235, below. Therefore, there is no prejudice from trial counsel's failure to advise Thompson of the effects of failing to adequately prepare for the penalty phase of the trial.

This Court finds that Thompson's trial attorneys competently and correctly advised him as to the claims in paragraph 19(c) on which testimony was presented. As to all of his allegations in paragraph 19(c), Thompson has not only failed to establish that his trial counsel's performance was deficient, he has also failed to establish any prejudice. In order to succeed on an ineffective assistance of counsel claim, a defendant must establish both deficient performance and prejudice. Thompson has not shown that but for his counsel's performance as to the claims in paragraph 19(c), the result of the trial would have been different. This claim

of ineffective assistance of trial counsel is without merit.

2. Allegations that trial counsel failed to investigate and prepare

In paragraph 19(a) Thompson alleges that trial counsel did not adequately investigate his case. This allegation is contradicted by the evidence submitted at the Rule 20 hearing.

Upon being appointed to represent Thompson in this case, trial counsel learned that Thompson had given a confession implicating himself as the sole perpetrator of this crime. Subsequent to that, trial counsel were told two or three different stories by Thompson as to what occurred on the night Maisie Gray was kidnapped, robbed, and murdered. However, he always maintained that he was involved in the robbery and kidnapping, although he told his attorneys he did not murder Maisie Gray.

Trial counsel repeatedly stressed to Thompson the importance of telling them the

truth about what occurred on the night Maisie Gray was murdered. State's Exhibit 1 clearly establishes this fact. Thompson maintained that he did rob and kidnap Maisie Gray, but that Shirley Franklin actually murdered Maisie Gray. It was on this basis that trial counsel conducted their investigation and developed their strategy.

Trial counsel testified, and this Court finds that testimony credible, that in preparing for this case, trial counsel interviewed law enforcement personnel involved in the investigation of this case; members of Thompson's family; Thompson himself; and, every person that Thompson named as being a possible witness for him in this case. Trial counsel testified, and Defendant's Exhibit 20 and 21 reflect, that they visited the scene of the crime and searched for witnesses in the community. Trial counsel did not find anyone in the community to testify on Thompson's behalf, except for two of his friends, Jackie Pope

and Connie Pope, and his mother, Joyce Parker. Trial counsel spoke with Thompson's mother about Thompson's childhood and any traumas he may have experienced. The contrary testimony of Thompson's mother, Joyce Parker, is not credible because, based on her testimony and demeanor, she was biased and not a credible witness. In their many hours of discussion with Thompson, trial counsel also asked Thompson about his childhood, educational background, drug and alcohol problem, and religious background. Thompson's testimony to the contrary is not credible.

In addition, trial counsel filed many pretrial motions, including a motion to produce. Their motion to produce was granted and they reviewed material in the District Attorney's file. The trial attorneys also researched the legal and factual issues they anticipated would arise before and during trial.

Trial counsel filed the motions for psychiatric examination because this was a capital case and because they felt it would help them establish a diminished capacity defense. Trial counsel's motion for psychiatric examination and motion for independent psychiatric examination were both granted and Thompson was evaluated at Taylor Hardin Secure Medical Facility by a lunacy commission and by a private psychiatrist hired by trial counsel, Dr. R.A. Sleszynski.

In general, trial counsel's performance in investigating Thompson's case was thorough and Thompson has not demonstrated that trial counsel's performance was "outside the wide range of professionally competent assistance." 466 U.S., at 690 [104 S.Ct., at 2066]. He has not shown his trial counsel's performance was deficient with respect to his two specific allegations of inadequate investigation either.

In paragraph 19(b), Thompson claims that his trial counsel were ineffective because

they failed to contact an eyewitness to the robbery of the victim. Thompson failed to name who the eyewitness to the robbery of Maisie Gray was and presented no testimony that there was in fact an eyewitness to the robbery of Maisie Gray. However, it appears from the testimony at the evidentiary hearing that Thompson is claiming that his trial counsel were ineffective for failing to contact a witness named Jack Lee Roberts.

Roberts is the same individual who is the basis of Thompson's Brady claim discussed [in "Exculpatory Evidence," part D.], above.

Trial counsel testified at the evidentiary hearing that they were aware that Roberts had given a description of an individual that he saw in the Majik Market shortly before Maisie Gray was discovered missing which description arguably did not fit the description of Thompson. However, based on their conversations with Thompson, trial counsel did not investigate this information further. Thompson had consistently maintained that he

committed the robbery and kidnapping of Maisie Gray and it was reasonable for trial counsel not to contact Roberts in light of that fact. Trial counsel's reliance on what Thompson told them in guiding their investigation was reasonable. As was noted in Strickland v. Washington, 466 U.S. at 690 [104 S.Ct. at 2066], the reasonableness of a counsel's actions may be determined or substantially influenced by what the defendant has told him.

Further, Thompson cannot establish prejudice with respect to this specific allegation of inadequate investigation. Roberts did not reveal to the police that he actually saw the robbery, kidnapping or murder of Maisie Gray. There is no evidence that, had this information been more thoroughly investigated, any more information would have been discovered. Thompson has failed to demonstrate that, but for counsel's performance in not contacting Roberts, the

outcome of the trial would have been different.

In paragraph 19(f), Thompson claims trial counsel failed to investigate critical state witnesses. In his amended petition, Thompson does not name what "critical state witnesses" were not adequately investigated. At the evidentiary hearing, the only critical state witness referred to by Thompson was Shirley Franklin. This Court finds that an adequate investigation was made of Shirley Franklin.

Prior to the trial of this case, trial counsel received a tape recorded statement by Shirley Franklin given to the Etowah County authorities during the investigation of this case. In the transcript of that statement, Defendant's Exhibit 12, Shirley Franklin implicated Thompson as the perpetrator of the robbery/kidnapping/murder of Maisie Gray. Trial counsel were told by Thompson that Shirley Franklin had a prior felony conviction and trial counsel continually, but unsuccessfully, tried to obtain some

confirmation of that fact. They finally had Shirley Franklin brought in and questioned and she admitted in a tape recorded interview that she had a prior armed robbery conviction and several escapes.

The Saturday before trial, Dobson received an NCIC report indicating that Shirley Franklin had a criminal record and, on the morning trial began, asked this Court to continue the case, which it refused to do. Trial counsel also objected to Shirley Franklin's testimony during the trial of this case because they had not been provided information on her prior criminal record.

Trial counsel also investigated Shirley Franklin's community reputation. They in fact discovered one witness who agreed to testify that Shirley Franklin had held a gun to his head while robbing him. That witness later refused to testify, however. Trial counsel's investigation of the State's witness Shirley Franklin was not outside the wide range of professionally competent

assistance. It was in fact thorough, complete investigation. Trial counsel did everything they could to obtain impeachment evidence on Shirley Franklin. That they were unsuccessful does not mean their performance was deficient.

Even if trial counsel's performance was deficient, Thompson cannot show any prejudice. Shirley Franklin testified at the 1985 trial that she had been convicted of armed robbery, as an accessory, in Indiana and had received a ten year sentence (TR 415-418) She also testified that she had been convicted of escape in Indiana. (T.R. 419-20) Thompson's present counsel did not present any additional evidence at the evidentiary hearing, and there is no additional evidence in this case, indicating that Shirley Franklin had been convicted of any other offenses. Therefore, Thompson has not demonstrated any prejudice from failing to further investigate impeachment evidence on Shirley Franklin. There is no evidence

that, but for trial counsel's performance, the outcome of Thompson's trial would have been different.

3. Allegation that trial counsel failed to seek order compelling compliance with motion to produce

In paragraph 19(r), Thompson alleges his trial counsel were ineffective because they failed to seek an order from this Court compelling the State to comply with this Court's February 5, 1985 order regarding production of documents, or produced documents so late that defense counsel were able to make little use of them at trial. This allegation is without merit.

Prior to trial, on January 31, 1985, trial counsel filed a motion to produce. (T.R. 77) That motion was granted, for the most part, on February 5, 1985. (T.R. 77) Trial counsel received twenty-five documents on February 25, 1985, as is reflected in Defendant's Exhibit 24.

This Court finds that with respect to efforts by trial counsel to obtain Shirley

Franklin's criminal record, trial counsel did all that was required, and that their performance was not deficient. Insofar as Thompson claims that trial counsel should have requested an order compelling compliance with this Court's discovery order in any other respects, Thompson has not demonstrated that the State failed to produce any other documents subject to that discovery order. Trial counsel's performance cannot be found to be deficient for failing to request an order compelling compliance with an order that counsel reasonably thought had been complied with.

Thompson has not shown any prejudice from trial counsel's failure to request an order compelling compliance with the discovery order either. Shirley Franklin admitted her prior criminal convictions at trial and Thompson has not demonstrated that there were any additional convictions to be produced. Thompson has also failed to show that the prosecution failed to comply with the Court's

discovery order in any other respect.

Thompson has failed to show any prejudice with regard to this claim because he has not demonstrated that the absence of a motion to compel compliance with the discovery order had any effect at all on his trial.

4. Allegation that trial counsel failed to adequately seek a change of venue

In paragraph 19(d) of his amended petition, in that part of the petition labeled "Grounds for Petition," Thompson alleges his trial counsel were ineffective because they failed to adequately seek a change of venue. This allegation is without merit.

Trial counsel filed a motion for change of venue (T.R. 63) and were heard on that motion on September 25, 1985. This Court took that motion under advisement and reserved ruling until after jury voir dire. (T.R. 64) After jury voir dire, trial counsel renewed the motion for change of venue, predicated on the responses of potential jurors to questions

posed during voir dire. (T.R. 157) This Court denied that motion again based on the fact that all jurors indicated that they could put aside anything they had read, heard, or seen about the case and decide the case based on the evidence presented in Court. (T.R. 155-56) At the evidentiary hearing in this case, Thompson introduced 37 articles from several different news sources in support of this claim. The articles were from the Gadsden Times, The Birmingham News, Birmingham Post-Herald, and the Southern Democrat. No evidence was presented regarding circulation figures in Blount County or how often each paper issued. This Court finds that the 37 articles are fact-based and are not sensational or inflammatory.

Trial counsel's performance was not deficient with respect to requesting a change of venue. Trial counsel did in fact request a change of venue prior to trial and subsequent to jury voir dire. Trial counsel

properly sought to base their motion on voir dire responses. Trial counsel's performance was not deficient.

Further, Thompson has failed to establish prejudice. Before he can establish that he was entitled to a change of venue, "the defendant in a criminal case has the burden of showing there was such prejudice prevailing in the community where his trial was set that a fair and impartial trial could not be had." McLaren v. State, 353 So.2d 24, 31 (Ala.Cr.App.), cert. denied, 353 So.2d 35 (Ala.1977). Because Thompson has failed to show that a fair and impartial jury could not be had in his case in Blount County, he has failed to establish that he was prejudiced by his trial counsel's failure in connection with the motion for change of venue.

All that petitioner presented at the evidentiary hearing in support of his contention that trial counsel should have obtained a change of venue were some

newspaper articles. As the Alabama Court of Criminal Appeals has held:

Newspaper articles alone would not necessitate a change of venue unless it was shown that the articles so affected the general citizenry through the insertion of such sensational, accusational or denunciatory statements, that a fair and impartial trial was impossible. Patton v. State, 246 Ala. 639, 21 So.2d 844 [1945].

McLaren v. State, 353 So.2d, at 31. The fact that a case generates even widespread publicity does not warrant a change of venue. E.g., Waldrop v. State, 459 So.2d 953, 955 (Ala.Cr.App.1983), aff'd, 459 So.2d 959 (Ala.1984); Sparks v. State, 450 So.2d 188, 191 (Ala.Cr.App.), cert. denied, No. 83-687 (Ala.1984). Newspaper stories that are not inflammatory or sensational do not warrant a change of venue. Primm v. State, 473 So.2d 1149, 1155 (Ala.Cr.App.), cert. denied, No. 84-906 (Ala.1985); McLaren v. State, 33 So.2d 24, 31 (Ala.Cr.App.), cert. denied, 353 So.2d 35 (Ala.1977). Thompson's evidence

failed to establish that he was entitled to a change of venue and, therefore, he has failed to establish a reasonable probability that, but for the absence of a properly supported motion for a change of venue, the outcome of his trial would have been different. Because he cannot show that he was prejudiced, this claim is without merit.

5. Allegation that trial counsel failed to adequately voir dire jury

In paragraph 19(e) of his amended petition in that part of the petition labeled "grounds of Petition," Thompson alleges his trial counsel were ineffective because they failed to adequately examine jurors who would automatically sentence to death one convicted of a capital offense and because they failed to voir dire potential jurors in any way to effectively discern if they would be biased or should otherwise be struck for cause. Thompson presented no evidence at the evidentiary hearing as to this claim and this allegation is without merit.

Trial counsel adequately questioned potential jurors as to their feelings on the death penalty and as to any bias they might have had against Thompson. Furthermore, Thompson has not shown any prejudice as he has not demonstrated that questioning could have been conducted which would have resulted in a different outcome at trial.

6. Allegation that trial counsel failed to object to cause challenges by the State

In paragraph 19(i) of his amended petition in that part of the petition labeled "Grounds of Petition", Thompson alleges his trial counsel were ineffective because they failed to object to the prosecutor's improper and arbitrary exercise of cause challenges against some venire members. Thompson offered no testimony as to this claim at the evidentiary hearing and this allegation is without merit.

Only three potential jurors were challenged for cause during jury voir dire in this case. (T.R. 85-87, 97-100, 167) All

three challenges were made by Thompson's trial counsel. Because the State did not challenge any individuals for cause, trial counsel's performance was not deficient for failing to object to any cause challenges by the State. Thompson also cannot demonstrate that but for trial counsel's performance, the outcome of his trial would have been different and has therefore failed to prove prejudice.

7. Allegations that trial counsel failed to present an adequate defense strategy at the guilt phase

In paragraphs 19(g), (t), and (x) of his amended petition in that part of the petition labeled "Grounds Of Petition", Thompson alleges that his trial counsel were ineffective because they failed to adequately prepare, investigate, pursue, and present a defense strategy at the guilt phase of his trial. This allegation is without merit.

In support of this claim, Thompson presented expert testimony by Richard Jaffe, a criminal defense attorney practicing in

Birmingham, hired by Thompson's present attorneys. It was Jaffe's opinion that trial counsel did not have a reasonable trial strategy and therefore rendered ineffective assistance. Jaffe was uncertain about the standard used to determine ineffective assistance claims under Strickland, and indicated that his opinions were not based solely on Strickland. Jaffe also testified that it is necessary to rely on information from your client in formulating a defense strategy and that he relies on such information in developing trial strategies. He also admitted that it is difficult to develop a defense strategy when there is a confession that is inconsistent with what your client has told you has occurred. Finally, Jaffe testified that it is not unusual for attorneys to disagree about how to conduct a defense and that just because the attorneys disagree doesn't mean that one strategy is right and the other is wrong.

As was discussed [in "Ineffective Assistance of Counsel," C. 1.], above, trial counsel developed their trial strategy based on the fact that Thompson continually maintained that he robbed and kidnapped Maisie Gray but that Shirley Franklin actually shot and killed Maisie Gray. Trial counsel's strategy at the guilt stage was to present evidence of Thompson's limited participation in the crime, to implicate Shirley Franklin as the murderer; and to present evidence of Thompson's diminished capacity due to his alcohol and drug use to negate the necessary intent. Trial counsel considered a possible insanity defense but based on their contact with Thompson and the report from Taylor Hardin Secure Medical Facility and the report from Dr. Sleszynski, a private psychiatrist hired by trial counsel, they rejected this defense. Trial counsel also attempted to have Thompson's statements to law enforcement authorities suppressed. Trial counsel's defense strategy

was a reasonable strategy based on the facts presented to them.

Thompson has not shown that trial counsel's defense strategy at the guilt stage was deficient. In fact, it was a sound, reasoned strategy. Trial counsel made the type of sound strategic decision after reasonable investigation that the Supreme Court has found to be "virtually unchallengeable." Strickland, 466 U.S. at 690 [104 S.Ct. at 2066]. Thompson also has not demonstrated prejudice as this Court finds that the ~~evidence presented in this case~~ established Thompson's guilt beyond a reasonable doubt.

Thompson claims in paragraph 19(g) that trial counsel were specifically ineffective in their defense strategy because they failed to prepare Thompson to testify. This Court finds as a fact that trial counsel adequately discussed and prepared Thompson for trial and advised him of the defense strategy to be followed in his case. Trial counsel even

went over the specific questions Thompson would be asked by them at trial. Therefore, trial counsel's performance was not deficient as to this specific claim. Further, Thompson has not demonstrated that, but for counsel's performance, the outcome of the trial would have been different. Thompson presented no evidence at the evidentiary hearing establishing that he was unprepared to testify or as to how a lack of preparation affected his trial.

Thompson claims in paragraph 19(t) that trial counsel was ineffective because it was admitted in opening statement that Thompson had kidnapped and robbed Maisie Gray and was present during her murder. Thompson presented testimony from Richard Jaffe regarding this specific allegation. It was Jaffe's opinion that trial counsel was ineffective for conceding guilt in opening statements. This Court rejects that opinion and finds that it was a reasonable strategic decision to admit Thompson's limited guilt in

opening statements in order to diminish the impact of the evidence presented during the trial, especially in light of trial counsel's defense strategy to admit limited participation and argue that Thompson was less culpable than Shirley Franklin.

Thompson has also not shown that trial counsel's decision to admit guilt in the robbery and kidnapping, but to deny participation in the murder prejudiced his defense. In light of the fact that there was evidence presented at trial that Thompson did participate in the robbery/kidnapping/murder of Maisie Gray in the form of his confession, the testimony of Shirley Franklin, and Thompson's own testimony, he has failed to demonstrate any prejudice from his counsel's opening argument admitting participation in the crime.

8. Allegation that trial counsel failed to adequately cross-examine a critical State's witness

In paragraph 19(f) of his amended petition in that part of the petition labeled "Grounds

Of Petition", Thompson alleges that his trial counsel were ineffective because they failed to adequately cross-examine critical State witnesses whose testimony had to be challenged to protect Thompson's interests and rights. Thompson did not indicate which State witnesses were not adequately cross-examined. However, this Court finds that trial counsel's cross-examinations of the State's witnesses were adequate and, especially with respect to Shirley Franklin and law enforcement officers, were thorough.

Because Thompson has not demonstrated what additional cross-examination should have been done or what cross-examination was improper, he has failed to establish that his lawyers' performance was deficient or that he was prejudiced by his lawyers' performance.

9. Allegation that trial counsel failed to object to the introduction of improper evidence

In paragraphs 19(j) and (o) of his amended petition in that part of the petition labeled "Grounds Of Petition", Thompson alleges his

trial counsel were ineffective because they failed to object to the introduction of improper evidence at the guilt phase, penalty phase and sentencing hearing before the trial court. Thompson presented no evidence with respect to this claim at the evidentiary hearing and this allegation is without merit.

Thompson has not shown that any evidence admitted by this Court at any phase of Thompson's trial was improper or inadmissible. He has not shown any deficient performance by trial counsel with respect to this claim and he has not shown that, but for counsel's performance, the outcome of his trial would have been different.

10. Allegation that trial counsel failed to object to the victim's daughter's presence at the prosecution's table and other improper references to the worth of the victim

In paragraph 19(e) of his amended petition in that part of the petition labeled "Grounds Of Petition", Thompson alleges that his trial counsel were ineffective because they failed to object to the victim's daughter's presence

at the prosecution table and because they failed to object to other improper references to the worth of the victim. Thompson presented no evidence on this claim at the evidentiary hearing and this allegation is without merit.

Trial counsel were not ineffective for failing to object to the victim's daughter's presence at the prosecution table because trial counsel were correct in their assessment that it was not objectionable for a member of the victim's family to sit at the prosecution table during the trial. See, Code of Alabama 1975, § 15-14-56. Thompson has not demonstrated deficient performance by trial counsel or that, but for the victim's daughter's presence at the prosecution table, the outcome of his trial would have been different and has, therefore, not established the necessary prejudice.

Thompson's trial lawyers were also not ineffective in failing to object to references to the victim's family. Thompson

was tried in 1985, two years before the United States Supreme Court's decision in Booth v. Maryland [482 U.S. 496] 107 S.Ct. 2529 [96 L.Ed.2d 440] (1987) and four years before that Court's decision in South Carolina v. Gathers, 57 U.S.L.W. 4629 [490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876] (June 12, 1989). Thompson's trial lawyers were not obliged to object based on possible future developments in the law in order to render effective assistance. Knight v. Dugger, 863 F.2d 705, 733 (11th Cir.1988); Elledge v. Dugger, 823 F.2d 1439, 1443 (11th Cir.), modified on other ground, 833 F.2d 250 (11th Cir.1987), cert. denied [485 U.S. 1014], 108 S.Ct. 1487 [99 L.Ed.2d 715] (1988); Thompson v. Wainwright, 787 F.2d 1447, 1459 n. 8 (11th Cir.1986), cert. denied [481 U.S. 1042], 107 S.Ct. 1986 [95 L.Ed.2d 825] (1987); Funchess v. Wainwright, 722 [772] F.2d 683, 691 (11th Cir.1985), cert. denied, 475 U.S. 1031 [106 S.Ct. 1242, 89 L.Ed.2d 349] (1986).

Thompson has also not demonstrated that the prosecutor in this case made "other improper references to the victim".

Therefore, he has not shown that there is a reasonable probability of a different outcome in this case had there been objections to specific improper references.

11. Allegation that trial counsel distanced themselves from Thompson throughout the trial

In paragraph 19(p) and (n) of his amended petition in that part of the petition labeled "Grounds Of Petition", Thompson alleges that his trial counsel were ineffective because they improperly distanced themselves from Thompson throughout the trial as demonstrated by references to their appointment as trial counsel and by a reference in closing argument to the heinousness of the crime. This allegation is without merit.

Trial counsel told the jury that they were appointed before asking the jury voir dire questions and during opening statements. It simply is not deficient performance to advise

a jury that trial counsel was appointed to represent a defendant. Even if it were deficient performance, Thompson has not demonstrated that it affected the outcome of his trial and has, therefore, not met the prejudice requirement of Strickland.

In closing, McPherson told the jury:

And in conclusion, Mr. Dobson and I are not condoning the acts of Michael Thompson in robbing Maisie Gray, in kidnapping her, and I want to say here and now to her family, that our sympathy goes out to them. And they have our sympathy. And this has been one of the most difficult tasks that I have had to do since standing in front of this bar for 17 years. But every defendant, no matter who he is, no matter how horrible, how heinous, how atrocious the crime he is charged with, he is entitled to the very best of the law and the Constitution of the United States.

(T.R. 799) Thompson alleges this argument by his trial counsel demonstrated a desire by counsel to distance themselves from him.

Thompson's expert, Richard Jaffe, testified that in his opinion this argument was

ineffective. This argument is consistent with trial counsel's defense strategy to admit guilt as to the robbery and kidnapping but to argue lesser culpability because of no participation in the murder. Further, even if this argument does demonstrate deficient performance by trial counsel, Thompson has not demonstrated that this brief comment undermines confidence in the outcome of Thompson's trial. No prejudice has been demonstrated by Thompson.

12. Allegation that trial counsel failed to have victim's body examined for blood or semen specimens

In paragraph 19(g) of the amended petition in the part of the petition labeled "Grounds Of Petition", Thompson alleges that his trial counsel were ineffective because they failed to seek to have the victim's body examined for blood or semen specimens which could have exculpated Thompson. Thompson presented no evidence in support of this claim at the evidentiary hearing and this allegation is without merit.

The victim's nude body was found submerged in water in an old well after over 20 days of exposure to the elements. Trial counsel had obtained copies of the autopsy report on the victim. Thompson's trial counsel did not seek examination of the victim's body due to the fact that they felt that little information could be obtained from the victim because of this exposure. Based on the information they had, they did not think it was necessary to have the body examined for blood and semen specimens.

Trial counsel also had a strategic reason for not seeking to have the victim's body examined for blood or semen specimens. According to what Thompson told his trial counsel, the only male who was present at the well at the time Maisie Gray was pushed into it was Thompson. Trial counsel felt that an examination of the body for semen specimens may have revealed that Thompson raped the victim, as well as having kidnapped and robbed her. Trial counsel made a reasonable

strategic decision to forgo having the victim's body examined for blood and semen specimens. Further, Thompson has again failed to establish any prejudice from the failure of trial counsel to have the victim's body examined and this claim must fail.

13. Allegation that trial counsel failed to prepare, investigate, and present a penalty phase strategy

In paragraphs 19(k) and (n) of his amended petition, in that part of the petition labeled "Grounds Of Petition," Thompson alleges his trial counsel were ineffective because they failed to prepare, investigate, and present a penalty phase defense strategy and effectively make a case for saving Thompson's life and this allegation is without merit.

Thompson presented the testimony of Richard Jaffe in support of this claim. It was Jaffe's opinion that trial counsel should have made additional use of Thompson's addiction and substance abuse, and evidence of his violent background at the penalty

phase of his trial. Jaffe testified that trial counsel were ineffective for failing to offer a meaningful mitigation defense. In his opinion, trial counsel should have pursued further, through investigation, the report of the private psychiatrist hired by them; should have called neighbors and friends of Thompson's to testify on his behalf; and should have looked at Thompson's school and medical records for possible mitigation. This Court rejects Jaffe's opinion that trial counsel failed to present a meaningful penalty phase defense and credits the testimony of Thompson's trial counsel on this issue.

Trial counsel knew before trial that there was a guilt phase and a penalty phase to a capital murder trial and they prepared for both phases prior to trial. The defenses to both phases were similar. As at the guilt phase, trial counsel presented evidence of Thompson's diminished capacity at the penalty phase through the testimony of his mother

regarding his drug and alcohol abuse. Trial counsel also presented testimony regarding the effects of Thompson's father's death on him, in an attempt to garner sympathy for Thompson.

In addition, trial counsel spoke with family members, friends, people in the community, and anyone Thompson told them to talk to in an attempt to discover any possible mitigation. This investigation was unsuccessful. They also questioned Thompson about his religious affiliation and he denied any. Finally, trial counsel also made a motion for psychiatric examination and motion for independent psychiatric examination, both of which motions were granted by this Court. Trial counsel considered these reports and spoke with Dr. Sleszynski, the private psychiatrist hired by them. Based on the reports and their discussions with Dr. Sleszynski, they made a strategic decision not to present this evidence. This was a

reasonable strategic decision, as is discussed more fully [in part 16], below.

Thompson has failed to demonstrate that trial counsel's performance was deficient. They investigated possible mitigating circumstances prior to trial, and based on what they found from this investigation, developed their penalty phase defense strategy. Because of the problems in discovering any witnesses who would come forward to testify on Thompson's behalf, and because Thompson adamantly refused to testify before the jury at the sentence phase, trial counsel presented the only witness in mitigation that they had, Joyce Parker, Thompson's mother. This was not deficient performance by trial counsel.

Thompson has also failed to establish prejudice. At the evidentiary hearing, Thompson presented several witnesses to demonstrate that trial counsel's investigation was inadequate and as a result his case was prejudiced. Thompson took the

stand and testified about his drug and alcohol problems; about his traumatic upbringing in a violent household; about his religious experiences; about head injuries he received as a child; about the effects of his father's death on him; and about other traumatic experiences growing up. Thompson testified that he did not tell his trial counsel about these experiences because they did not ask him about it. He also testified that he was not given the opportunity to testify at the penalty phase of his trial. This last contention of Thompson's is directly contradicted by Thompson's testimony at his 1985 trial. (T.R. 847-49) It is also contradicted by trial counsel's testimony at the evidentiary hearing. This Court finds that trial counsel asked Thompson about his background in an attempt to discover evidence to present in mitigation and he failed to reveal to them the information regarding his background that he testified to at the evidentiary hearing. The Court finds that

the absence of this evidence at trial is attributable to Thompson's refusal to testify and not any deficiency in his counsel's performance.

This Court also finds that had Thompson presented this testimony to the jury, there is no reasonable probability that the outcome of his trial would have been different, because of the overwhelming evidence against Thompson and because there is no reasonable probability that the jury would have recommended anything but a sentence of death.

Further, this Court finds that had this Court or the jury heard the testimony of Laura Thompson, Alfred Lett, and Jerry Fleming at trial, there is no reasonable probability that the outcome of the trial would have been different. Laura Thompson's testimony was not helpful to Thompson's claim to have extensively abused drugs and alcohol in that she entrusted her infant child to his care, including riding in a car driven by him. Alfred Lett's testimony was not helpful

to Thompson's claim to have used drugs and alcohol extensively in that he described Thompson as a good worker and further had only limited contact with Thompson. Reverend Fleming had no contact with Thompson for many months preceding the crime. Additionally, all of these witnesses displayed a strong bias toward Thompson which undercuts their credibility. This testimony is far from compelling and does not create a reasonable probability that, had it been presented, Thompson would not have been sentenced to death.

Joyce Parker's testimony also does not establish prejudice. Parker testified that she was never contacted prior to trial about testifying on behalf of her son. This testimony was contradicted by trial counsel. It is also reflected in Dobson's fee sheet, Defendant's Exhibit 20, that he spoke with Thompson's mother prior to trial. This Court finds that trial counsel's testimony was credible and that Parker's was not. This

Court also finds that Parker's Rule 20 testimony was merely cumulative with respect to Thompson's drug and alcohol abuse and the effects on Thompson of his father's murder. Parker testified before the jury at trial as to that mitigation.

14. Allegation that trial counsel failed to object to improper statements of the Blount County Sheriff during trial

In paragraph 19(u) of his amended petition in that part of the petition labeled "Grounds Of Petition," Thompson alleges his trial counsel were ineffective because they failed to object to, or seek a mistrial as a result of, improper statements made by the Blount County Sheriff at Thompson's trial, in the presence of the jury, to the effect that a witness would not "come in and lie" for Thompson. Thompson testified to this alleged incident at the evidentiary hearing. This Court finds as a fact that Thompson was not a credible witness and that this allegation is without merit.

Thompson claimed that Blount County Sheriff J.C. Carr was in the courtroom and the jury was present when the Sheriff told him that Rickey Pope, a possible defense witness, was not coming to testify and said that Rickey would not come in and lie for him. Thompson claimed that the judge and defense and prosecution counsel were in chambers, out of the courtroom, when this incident occurred. Thompson claimed that when the judge and counsel returned to the courtroom, he told Dobson about this incident but Dobson did nothing about it.

Trial counsel testified that they had no recollection of the events that Thompson described. Dobson testified that he recalled Thompson telling him about something an officer said to him but does not recall that the jury was present. He also testified that it is not the practice in Blount County, and this Court finds that it is not the practice in Blount County, to leave a jury in the courtroom alone with the defendant. Dobson

testified, and this Court finds as a fact, that Thompson also sat at the table farthest from the jury, so that even if Sheriff Carr had made the comment Thompson claims that he did, it was not likely that the jury heard the comment.

Based on the testimony, and the demeanor of the witnesses, this Court finds that the incident described by Thompson did not occur and that trial counsel's performance was not deficient in not objecting to a statement and incident which did not occur.

15. Allegation that trial counsel failed to object to the trial court's improper instructions to the jury

In paragraph 19(m), (w)(iii) and (w)(iv) of his amended petition in that part of the petition labeled "Grounds Of Petition," Thompson alleged that trial counsel were ineffective because they did not object to improper jury instructions. Thompson claims that this Court improperly instructed the jury as to: i) mitigating evidence and unconstitutionally limited what could be

considered by the jury; ii) the Court's opinion that the courts were burdened by new procedures such as the procedure about to be followed and that there was nothing wrong with the procedures used in times past; and, iii) the weighing of aggravating and mitigating circumstances.

i. Instructions on Mitigation

Thompson first alleges that this Court improperly instructed the jury on mitigating evidence in such a way that it limited what mitigation could be considered by the jury. Thompson has not demonstrated what instructions improperly limited what mitigation could be considered by the jury nor has he shown how the instructions were improper or how they prejudiced his case. There is no merit to this allegation. This Court specifically instructed the jury that:

The mitigating circumstances [sic] does not have to be included in the list I have read to you in order for it to be considered by you. In addition to the mitigating circumstances previously specified, mitigating

circumstances include any aspect of the defendant's character or record, and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life in prison without parole instead of death.

This is a correct statement of the law under Eddings v. Oklahoma, 455 U.S. 104 [102 S.Ct. 869, 71 L.Ed.2d 1] (1982), and Thompson has failed to demonstrate that he was prejudiced by trial counsel's failure to object to these instructions.

ii. Statement to Jury Regarding Burden of New Procedures

In paragraph 19(w)(iii), Thompson claims his trial counsel were ineffective for failing to object to this Court's statement to the jury, prior to instructing them at sentencing, that in this Court's opinion, the courts were burdened by new procedures such as the procedure about to be followed and that there was nothing wrong with the procedure used in times past. What this Court actually said before charging the jury at the sentence stage was the following:

[I]t seems to me sometimes when I get to studying about the burden the law places on the Courts and also on the jury, especially the jury, our system sometimes this Court feels like it is getting bogged down to some extent with procedure, because the law didn't use to be that way in times past. And personally, I didn't find much wrong with it. Our framers of our Constitution didn't find anything wrong with it back when the Constitution was adopted. But in any event, we have the procedures that we must follow.

(T.R. 868-69). This Court then proceeded to charge the jury which charge included an instruction that "no ... remark or any other expression that I have made at any time during this trial, even during the guilt stage or during this sentence hearing, is intended to indicate any opinion of what the facts are or what the punishment should be."

(T.R. 880). This instruction clearly counteracts any prejudicial effect the quoted statement may have had. Thompson has not demonstrated that his trial counsel were

ineffective for failing to object to this statement.

iii. Weighing of Aggravating and Mitigating Circumstances Instruction

In paragraph 19(w)(iv), Thompson alleges trial counsel were ineffective because they failed to object to this Court's jury instructions regarding the weighing of aggravating and mitigating circumstances. Thompson presented no evidence at the evidentiary hearing as to how these instructions were improper. He also presented no evidence that the jury's recommendation of death was influenced by these instructions or that they would not have sentenced Thompson to death absent these instructions. The Court's instruction was proper and this allegation is without merit.

16. Allegations that trial counsel failed to adequately investigate Thompson's emotional and mental health problems and limitations

In paragraph 19(h), (s), and (w)(ii) of his amended petition in that part of the petition labeled "Grounds Of Petition,"

Thompson alleges that his trial counsel were ineffective because they failed to adequately investigate Thompson's emotional and mental health problems and limitations; because they failed to seek a prompt hearing on Thompson's motion for independent psychiatric examination; because they failed to procure an expert to testify at the sentence phase of the trial; and, because they failed to object to the denial of Thompson's motion or a continuance so that Thompson could obtain an independent psychiatric examination. This allegation is without merit.

As was discussed [under "Ineffective Assistance of Counsel," C. 2.], above, trial counsel conducted an extensive investigation of Thompson's background in an attempt to discover any possible mitigation. In addition, they asked for and received both a lunacy evaluation of Thompson at Taylor Hardin Secure Medical Facility and a private psychiatric examination by an examiner of their own choosing, Dr. R. A. Sleszynski,

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M.D. Based on their investigation and the results of these reports, trial counsel made a strategic decision to present evidence of Thompson's drug and alcohol problems and the effects of his father's death on Thompson through lay testimony. Thompson refused to testify before the jury at sentencing, so his trial counsel relied on Thompson's guilt phase testimony and the testimony of his mother in establishing this mitigating circumstance.

Trial counsel made a strategic decision not to use the information contained in Dr. Sleszynski's report or to have Sleszynski testify for two reasons. First, they considered that the information in the report was open to rebuttal by the Taylor Hardin report. The Taylor Hardin report established that Thompson was criminally responsible for his actions at the time of the crime even though at the time of "the alleged offense, it is possible Mr. Thompson was under the influence of self-administered intoxicants at

that time." (CR. 83). Trial counsel felt that evidence from the Lunacy Commission report that Thompson was competent and that his self-administered intoxicants did not diminish his criminal responsibility could have been harmful to Thompson.

The second reason trial counsel did not use Sleszynski's report is because, after discussing the report with Sleszynski, trial counsel felt that Sleszynski was not sympathetic to their client and his attitude on the witness stand would be detrimental to their client. Trial counsel feared that, due to his lack of sympathy, Sleszynski could have harmed their client on cross-examination by the prosecution.

Trial counsel's strategic reasons for not using the Sleszynski report were within the "wide range of reasonable professional assistance," and Thompson has not demonstrated any prejudice from failure to use the report or from failure to investigate his drug and alcohol problems further.

Thompson presented two experts with respect to this issue: Richard Jaffe, a criminal defense attorney and Dr. Bill Beidelman, a clinical psychologist. Jaffe testified that trial counsel were ineffective for failing to make further use of Thompson's [addiction] and substance abuse and to have further argued this mitigation to the jury at the penalty phase. Trial counsel made a reasonable strategic decision not to present further testimony in the form of expert testimony at the penalty phase of Thompson's trial. As discussed above, this was a reasonable strategic decision and as Jaffe himself acknowledged it is not unusual for attorneys to disagree about strategy. Jaffe also acknowledged that trial counsel's discussions with Sleszynski could have formed a basis for not using his testimony at trial.

Beidelman was and is a clinical psychologist licensed to practice in Alabama. Beidelman was hired by Thompson's present counsel to interview him. Based on this

interview of Thompson; his psychological testing of Thompson; his review of records in this case; and discussion with Thompson's mother, it was Beidelman's testimony that Thompson was suffering from alcoholism; poly-substance abuse; and anti-social personality disorder in remission. Beidelman testified that this diagnosis was accurate as to the time of the crime, as well. These were the same diagnoses given by Sleszynski and one of the members of the Lunacy Commission that evaluated Thompson. Thompson's trial attorneys had this information and Thompson has not shown that any failure to further investigate this issue prejudiced this case.

Thompson took the stand at the evidentiary hearing and testified about many things in his background, including his alcohol and drug problems; his violent upbringing; traumatic experiences in his life; and head injuries he received as a child. Thompson discussed these problems with Beidelman and

Beidelman still had the same diagnoses that prior examiners of Thompson had. Therefore, Thompson has not shown any prejudice from his trial counsel's failure to discover this information so that they could present it to an expert to examine.

In paragraph 19(s), Thompson alleges that trial counsel failed to seek a prompt hearing on Thompson's motion for an independent psychiatric examination, and, when the Court granted the motion 18 days before the trial, failed to obtain the assistance of an expert psychiatric witness to testify at the penalty phase of the trial. Trial counsel made a motion for psychiatric examination after discussing the issue with Thompson on January 31, 1985 (CR. 76-76) and this Court granted that motion on February 5, 1985 (CR. 79-80). Trial counsel waited for the report from Taylor Hardin before seeking an independent examination, which was a reasonable trial decision. Trial counsel testified and this Court finds that subsequent to this Court

granting their motion for an independent evaluation trial counsel diligently searched for and finally obtained an expert to examine Thompson. For the reasons set out above, trial counsel chose not to have that expert testify. Thompson has not shown that trial counsel's performance was deficient in this matter or that he was prejudiced by his lawyers' decision.

In paragraph 19(w)(ii), Thompson alleges that his trial counsel were ineffective because they did not object to this Court's denial of Thompson's motion for a continuance so that Thompson could obtain an independent psychiatric examination. Trial counsel moved for a continuance but their motion was denied by this Court. "It is well settled that a continuance in a criminal trial is addressed to the sound discretion of the court and will not be disturbed unless clearly abused.

Young v. State, 469 So.2d 683

(Ala.Cr.App.1985); Dawkins v. State, 455

So.2d 220 (Ala.Cr.App.1984); Sparks v. State,

450 So.2d 188 (Ala.Cr.App.1985)." Howard v. State, 506 So.2d 351, 352 (Ala.Cr.App.1986). Trial counsel's performance was not deficient because they failed to object further to this Court's denial of the continuance and Thompson was not prejudiced since this Court did not abuse its discretion. Also, there was no prejudice because Thompson did obtain an independent psychiatric examination before trial.

17. Allegations that trial counsel failed to object to the prosecutor's improper and misleading closing arguments

In paragraph 19(v) of his amended petition in that part of the petition labeled "Grounds Of Petition," Thompson alleges trial counsel were ineffective for failing to object to certain arguments made [by] the prosecutor in closing. This allegation is without merit.

Both trial counsel testified that they had a general policy of not objecting to closing argument unless it is prejudicial to a client because objections tend to draw attention to and emphasize that argument to the jury. It

was also McPherson's opinion that objections during closing arguments can detract from gaining sympathy for a client from the jury. These are reasonable strategic reasons for not objecting to prosecutorial argument.

In order to prevail on a claim of ineffective assistance of counsel for failure to object to prosecutorial argument, Thompson must prove prejudice. The standard for determining whether prosecutorial argument entitles a petitioner to relief is whether there is a reasonable probability that the statements rendered the proceeding fundamentally unfair. Thompson alleges ten instances of improper argument in the petition.

Thompson's contention, that the prosecutor's assertions of opinion concerning the veracity of the defendant's testimony, i.e., repeated statements that the defendant had lied to the jury, were improper, is without merit. There was evidence that Thompson had changed his story regarding the

events surrounding the robbery/kidnapping/murder of Maisie Gray and there was direct evidence impeaching his testimony at trial. The fact is that Thompson had lied and there was evidence of that presented in this case. The prosecutor's comments on the evidence were not improper.

Thompson's contention, that the prosecutor's discussion of the Biblical law of punishment, based upon the maxim an eye for an eye, a tooth for a tooth, a life for a life was improper, is without merit. Where defense counsel have argued Biblical law as Thompson's counsel did in closing (T.R. 794, 800), prosecution argument replying to those arguments not improper.

Thompson's contention that the prosecutor's arguments that the defense counsel did what they were supposed to do; that "I helped choose you"; and that "I take part in this as if I were on the jury" were not improper. These comments taken in

context were arguments for the jury to do its duty. Arguments to the jury to carry out their proper function are not improper.

Thompson's contention, that the prosecutor improperly argued that Thompson might commit future crimes if turned loose and that the jury needed to rid the county of people like the defendant so that people can live without fear of his committing another crime ..., is without merit. These are proper deterrence arguments. Trial counsel are not obliged to object to proper argument.

Thompson's trial lawyers did not render ineffective assistance by not objecting to the prosecutor's comment on Thompson's criminal ego. Even if this argument was improper, trial counsel's performance was not deficient. Thompson was not entitled to a perfect trial but rather a fair one and the absence of an objection to this one brief comment did not render his trial unfair.

Thompson's lawyers were also not ineffective in failing to object to

references to the victim's family. As noted above, Thompson's trial lawyers were not required to object based on predictions as to how the law might develop. Therefore, his lawyers' performance was not deficient and this allegation, like the rest above, lacks merit.

18. Allegation that trial counsel failed to object to the trial court's denial of Thompson's request for a pre-trial suppression hearing

In paragraph 19(w)(i) of his amended petition in that part of the petition labeled "Grounds Of Petition," Thompson alleged that his trial counsel were ineffective because they failed to object to this Court's denial of their request for a pre-trial suppression hearing. Thompson received a complete suppression hearing before his confessions were admitted into evidence. He has failed to show that this Court's denial of his motion to have that hearing before trial prejudiced his case and he has, therefore,

not demonstrated ineffective assistance of counsel with respect to this claim.

19. Allegations of Ineffective Assistance of Appellate Counsel

In paragraph 19(y)(i)-(vi) of his amended petition in that part of the petition labeled "Grounds Of Petition", Thompson alleges his appellate counsel, John Dobson and B.J. McPherson, were ineffective because they failed to adequately prepare Thompson's appeal and because they failed to raise certain issues on appeal. Thompson's appellate counsel's performance in preparing and effectuating his appeal was not deficient.

Dobson testified that prior to preparing the appellate brief in this case, he reviewed the entire record and wrote down all the adverse rulings made by this Court. He then researched all possible claims and decided based on that research to raise those claims he thought were likely to succeed. Dobson testified that he didn't raise several of the issues Thompson now claims he should have

raised based on the law and his likelihood of success of the merits. In particular, he testified that he did not raise the venue issue; and the improper closing argument issue because based on his research, those issues would not have been successful on the merits. This Court finds that trial counsel ably researched and prepared Thompson's appeal in this case.

A lawyer is not required to raise all conceivable claims in order to render effective assistance. Lindsey v. Smith, 820 F.2d 1137, 1144 (11th Cir.1987). It is sound strategy for a lawyer to narrow the number of issues on appeal. Smith v. Murray [477 U.S. 527] 106 S.Ct. 2661, 2667 [91 L.Ed.2d 434] (1986). This type of winnowing out of weaker arguments in favor of those arguments likely to succeed is the type of effective appellate advocacy approved by the United States Supreme Court. The fact that Dobson and McPherson focused on issues other than those Thompson's current counsel has selected does

not remove their representation of Thompson from the wide range of professionally competent assistance.

Thompson failed to establish that Thompson rendered ineffective assistance of counsel at trial or on appeal. He is not entitled to relief on any of his ineffective assistance of counsel claims.⁵

For the reasons set out above, it is hereby ORDERED, ADJUDGED, and DECREED that

⁵ At the evidentiary hearing, in the testimony of Richard Jaffe, Thompson elicited Jaffe's opinion on actions and omissions by trial counsel which were not raised in the Rule 20 petition. Jaffe's testimony included references to trial counsel's non-objection to advising the jury that their verdict was advisory, to references to prior robberies, and to the failure to instruct on felony-murder among other things. Because this testimony did not relate to any allegation of ineffective assistance of counsel pleaded by Thompson, it cannot constitute a basis for relief. Thompson is not entitled to relief on any claim not pleaded with specificity. Temporary Rule 20.6(b), Alabama Rules of Criminal Procedure.

the above-styled Rule 20 petition for relief
from conviction or sentence be DENIED.

Done this the 15th day of Feb., 1989.

H. E. Holladay
Presiding Circuit Judge

DOCUMENT NUMBER 4

Ex parte Michael Eugene THOMPSON.

(Re Michael Eugene Thompson v. State)

85-1004.

Supreme Court of Alabama.

Feb. 20, 1987.

Petition for Writ of Certiorari to
the Court of Criminal Appeals (6 Div. 799).

B.J. McPherson and John J. Dobson,
Oneonta, for petitioner.

Charles A. Graddick, Atty. Gen., and
William D. Little and Mary Ellen Forehand,
Asst. Attys. Gen., for respondent.

Prior report: 503 So.2d 871

(Ala.Cr.App.1986).

BEATTY, Justice.

Having considered the record, briefs,
and oral argument in this case, this Court
holds that the judgment of the Court of
Criminal Appeals must be, and it is hereby,
affirmed.

AFFIRMED.

All the Justices concur.



DOCUMENT NUMBER 5

Michael Eugene THOMPSON

v.

STATE.

6 Div. 799.

Court of Criminal Appeals of Alabama.

April 8, 1986.

Rehearing Denied May 13, 1986.

B.J. McPherson and John J. Dobson,
Oneonta, for appellant.

Charles A. Graddick, Atty. Gen., and
William D. Little and Mary Ellen Fike
Forehand, Asst. Attys. Gen., for appellee.

TYSON, Judge.

Michael Eugene Thompson was indicted for the capital murder of one Maisie Gray in violation of § 13A-5-40(a)(1) and (2), Code of Alabama 1975. The jury found the appellant "guilty of capital murder" and, following a sentencing hearing, the jury recommended that the appellant "be punished by death." Following a separate sentence

hearing held by the trial court, the trial judge accepted the jury's recommendation and sentenced this appellant to death.

A brief statement of the facts is set out below. A more thorough recitation of the circumstances of this cause is set forth as needed in discussing each of the issues raised on appeal.

On the night of December 10, 1984, the appellant, Thompson, proceeded to the Majik Mart in Attalla, Alabama. One Maisie Gray was the only person working at the store that night. When the appellant arrived at the store, he went into the store and bought a "Coke or a beer". He then left the store, proceeded to his car where he picked up his .22 caliber pistol and reentered the store. Appellant then forced Ms. Gray to empty the cash register. Thompson then took Ms. Gray outside the store, forced her into his car and left the area. After driving around for some time, Thompson took Ms. Gray to a well in Blount County. He then forced Ms. Gray

into the well and, according to his own statement, he shot into the well several times. Thompson then left and proceeded to the home of one Shirley Franklin with whom he was living at the time. Once there, he picked up some more bullets for the pistol and told Shirley to go with him. The appellant and Shirley then proceeded back to the well. The appellant shot into the well some seven or eight more times. Thompson denied this statement during trial, testifying instead that Shirley Franklin had done all the shooting into the well.

Thompson and Franklin then returned to their home. The next day Thompson took the pistol, which he and Shirley had cleaned, to another well and threw it in there. The body of Maisie Gray was discovered on January 5, 1985. The Department of Forensic Sciences was able to make a determination as to the cause of death, i.e., multiple gunshot wounds. There were seven bullet wounds in the body of the victim.

I

The appellant contends that the trial court committed reversible error by denying his motion for a continuance made on the morning of trial.

The record reflects that, prior to the trial of this cause, indeed, prior to the completion of the jury selection process, the trial court held a hearing on the motion for continuance. Appellant was requesting the continuance in order to obtain the criminal record of Shirley Franklin. A review of the record of the hearing indicates that the State made repeated efforts to get the information for the defendant prior to trial, that they finally had Ms. Franklin brought in and questioned and, in this tape recorded interview, she admitted a prior record in Indiana and that she had served six years, eight months and twenty-one days in jail. This information was then turned over to the defendant. From the record: (R. 56-61):

"THE COURT: Well, I'm going to put the burden on you at this time, rather than delay the trial, when the matter may not--the question that you are asking the Court at this time may not ever come up. But if you feel like that there is a possibility. Have you questioned the witness with regard to these matters?

"MR. DOBSON: No, sir, I have not.

"THE COURT: Well, why not do that first?

"MR. DOBSON: I have heard a taped statement where she has admitted one of these convictions.

"THE COURT: Well, why don't you question her now. Then you can impeach her with permission of this Court--well, it wouldn't be necessary--by showing that she had made prior statements to that.

"MR. DOBSON: That's correct.

"THE COURT: I would suggest--even though she is a State's witness, she is not insulated from the defendant's lawyers.

"MR. DOBSON: She can be impeached on her prior statement.

"THE COURT: Gentlemen, the question may not come up. I would suggest that if you have any questions about it that you should make an effort to get any documentation on it at this time.

"MR. MCPHERSON: Judge, may we ask you to do this: would you direct the State of Alabama to make an effort to get this, because it not only has to be certified, it must be exemplified.

"THE COURT: I don't know that that is right. I think in this case if it's a certified copy of the record. Now, there are some laws on other matters requiring it to be certified and

exemplified, but as far as a record of conviction--maybe it is out of another state.

"MR. MCPHERSON: Yes, sir, it has to be exemplified.

"THE COURT: The law would speak to that.

"MR. MCPHERSON: I think we can resolve the whole problem if they would agree to stipulate that what is contained on the NCIC is correct.

"THE COURT: Unless they know, I think they would be fools, unless they have actual knowledge of it to stipulate to any such thing.

"MR. BURTTAM: Judge, Mr. Dobson, and maybe Mr. McPherson, for a good many days prior to last Saturday, kept telling us that they thought she had a record. I don't know how many times we asked for a printout on her, and showed it to him each time.

"THE COURT: How about putting it in the record how many times you asked for a printout?

"MR. BURTTTRAM: How many, John?

"MR. DOBSON: How many times did I ask you or Robert?

"MR. BURTTTRAM: I'm talking about the printouts that were shown to you when you would ask and they would go down and put it in the machine?

"MR. DOBSON: I was down there all morning Thursday.

"MR. BURTTTRAM: Several times?

"MR. DOBSON: I was down there two times, anyway, three times.

"MR. BURTTTRAM: And it would always come back from Indiana, no record. So, Mr. Dobson insisted that she had a record. I presume that maybe he got it from the defendant, the information or something. Anyway, he had belief that she had a record. I sent for her, had her brought to the

office, sat her down, and she was interviewed for some hour and a half. And it was taped. In that interview, she stipulated that she did have a record in Indiana and had served what?

"MR. DOBSON: Six years, eight months and twenty-one days.

"MR. BURTRAM: All right. And that is the best that we were able to produce for this man at his request in the way of a record. I thought coming from the witness--

"THE COURT: Have you furnished them with all the information you have as far as her record is concerned?

"MR. BURTRAM: Absolutely. He has something that I haven't, now. He got it Saturday.

"THE COURT: All right.

"MR. BURTRAM: He's got everything that I have. I could swap files with

him right now, Judge, and I wouldn't be any worse off or any better off.

"THE COURT: I will reserve any further ruling with regard to that question at the time it might be raised in the trial. I would suggest that if you have--the first thing that I would suggest that you do is talk to the defendant--I mean, not the defendant--talk to the witness. We might be sitting here arguing about nothing. However, if it comes up, as you stated in the trial, I would suggest that after talking to her, if you have any doubts about it, that you should forthwith proceed with efforts to get whatever is there. Mr. Burttram, I know it is hard for the defendant to get those records, if such be, if there are any records.

It is clear to this court that the trial court did not prejudice this appellant

in any way by refusing to grant the motion for continuance. It should be noted that a continuance in a criminal case is addressed to the sound discretion of the trial court, the exercise of which will not be disturbed on appeal unless clearly abused. McConico v. State, 458 So.2d 743 (Ala.Crim.App.1984); Pritchett v. State, 445 So.2d 984 (Ala.Crim.App.1984); Fletcher v. State, 291 Ala. 67, 277 So.2d 882 (1973). There has been no abuse of discretion shown here. See Beauregard v. State, 372 So.2d 37 (Ala.Crim.App.1979), cert. denied, 372 So.2d 44 (Ala.1979).

Moreover, Ms. Franklin admitted her prior criminal record during her testimony, thus completing her impeachment. See C. Gamble, McElroy's Alabama Evidence, § 145.01(17) (3rd ed. 1977). The appellant simply was not prejudiced by the trial court's refusal to grant his motion for a continuance.

II

The appellant contends that the trial judge erred by failing to declare a mistrial during the State's cross-examination of the appellant. During cross-examination of the appellant, the State elicited information as to a prior conviction. The appellant contends that in this conviction he, Thompson, was afforded youthful offender status and such was, therefore, improper impeachment, requiring a mistrial. However, it is not clear from the record that this was, in fact, a reference to a youthful offender conviction. (R. 746-747).

It should be noted initially that "[t]he grant or denial of a mistrial is a matter within the sound discretion of the trial court and will only be disturbed upon a showing of manifest abuse." Durden v. State, 394 So.2d 967 (Ala.Crim.App.1980), cert. denied, 394 So.2d 977 (Ala.1981); Wright v. State, 421 So.2d 1324 (Ala.Crim.App.1982); Shadle v. State, 280 Ala. 379, 194 So.2d 538

(1967); Davis v. State, 457 So.2d 992 (Ala.Crim.App.1984). "The entry of a mistrial is not lightly to be undertaken. It should be only a last resort, as in cases of otherwise ineradicable prejudice. Where error is eradicable a mistrial is too drastic and is properly denied. Chillous v. State, 405 So.2d 58 (Ala.Crim.App.1981); Van Antwerp v. State, 358 So.2d 782 (Ala.Crim.App.), cert. denied, 358 So.2d 791 (Ala.1978); Thomas v. Ware, 44 Ala.App. 157, 204 So.2d 501 (1967)." Woods v. State, 460 So.2d 291, 296 (Ala.Crim.App.1984).

After a hearing on this matter, held outside the presence of the jury, the trial judge immediately instructed the jury to disregard the testimony, polled the jurors and determined that they would not be affected by this testimony. (R. 748). The actions of the trial judge were prompt in this cause. The matter objected to was not so prejudicial that it could not be erased from the minds of the jury. In such a case

the right to declare a mistrial is a discretionary matter. See Durden, supra; Shadle, supra. The record in this cause does not support a finding of manifest abuse. The action of the trial court cured any possible harm to this appellant. See Walker v. State, 428 So.2d 139 (Ala.Crim.App.1982); Kendrick v. State, 444 So.2d 905 (Ala.Crim.App.1984).

III

The appellant contends that the trial court erred in admitting two statements made by him into evidence. He argues that the statements were not voluntarily made and, therefore, inadmissible.

The first statement complained of by the appellant was made to the Sheriff of Etowah County on January 6, 1985. Prior to admitting this statement into evidence, the trial judge held a hearing outside the presence of the jury. (R. 268-314).

Sheriff McDowell of Etowah County testified that he advised the appellant of his Miranda rights and that the appellant signed a form

indicating that he understood those rights. No one in his presence threatened the appellant, or offered him any hope of reward or any deal or otherwise coerced or enticed the appellant into making a statement. This statement was tape recorded and played for the trial judge. The appellant testified during the hearing that he was advised of his Miranda rights prior to making the statement, that he signed a waiver of rights form and that he knew what he was doing when he signed the form. He testified that the Sheriff did not threaten, coerce, pressure him or offer him any reward or promise him anything to make a statement. He admitted that the tape recording was an accurate depiction of his conversation with the Sheriff. The appellant contends, however, that he was tricked into making a statement. He claims that Shirley Franklin told him that one Jackie Pope had turned him in to the police. He also claims that, prior to his talking to Sheriff McDowell, he was told by the police that they

were going to arrest Shirley Franklin and that she would be tried and electrocuted unless the appellant confessed. Shirley Franklin testified that she did not tell the appellant that Jackie Pope had turned him in to the police.

"The State must show both a voluntariness and a Miranda predicate in order for a statement to be deemed admissible." Thomas v. State, 373 So.2d 1149 (Ala.Crim.App.), aff'd, 373 So.2d 1167 (Ala.1979). The prosecution brought forth testimony which properly showed that the appellant was advised of his Miranda rights, that he had not been threatened, intimidated, coerced or promised any reward for making a statement, or that he was otherwise induced, and that he freely and voluntarily waived his rights. "It is the province of the trial judge to first determine the voluntariness of a statement in a voir dire examination outside the presence of the jury and, unless there is clear abuse, this discretion will

not be overturned." Duncan v. State, 278 Ala. 145, 176 So.2d 840 (1965); Shewey v. State, 48 Ala.App. 730, 267 So.2d 520 (1972); Bills v. State, 49 Ala.App. 726, 275 So.2d 706 (1973); Crozier v. State, 465 So.2d 1190 (Ala.Crim.App.1984).

When the evidence on the circumstances surrounding the appellant's confession is conflicting on voir dire, the trial judge must determine its admissibility. If admitted, then the controverted testimony for the appellant goes to the jury on the confession's credibility. Where the trial judge finds conflicting evidence that the confession was voluntarily made, its finding will not be disturbed on appeal unless found to be manifestly contrary to the great weight of the evidence. Harris v. State, 420 So.2d 812 (Ala.Crim.App.1982); Myers v. State, 401 So.2d 288 (Ala.Crim.App.1981); Balentine v. State, 339 So.2d 1063 (Ala.Crim.App.), cert. denied, 339 So.2d 1070 (Ala.1976).

This court has held that, where the testimony of the officer shows that the appellant was read his rights, stated that he understood those rights and that he was not being threatened, coerced nor promised anything to secure this statement, indicated that he wanted to talk and made a recorded statement, this testimony was sufficient to sustain a finding that the appellant's statement was voluntary, even though the defendant contended otherwise. See Sales v. State, 432 So.2d 560 (Ala.Crim.App.1983).

A review of the record in this matter supports the trial judge's decision to admit the statement of this appellant. Such was proper. The statement made to Blount County authorities on January 7, 1985, is likewise admissible. Officer Fowler testified outside the presence of the jury that he read the appellant his Miranda rights, that appellant stated that he understood those rights, that the appellant signed a waiver of rights form and made a statement to Fowler. Fowler

further stated that the appellant was not threatened, coerced or otherwise induced into making a statement. He stated that no promises were made to the appellant, nor was there any offer of or hope of reward made to appellant. The appellant testified that Fowler did read him his Miranda rights and that he signed a waiver of rights form. However, he denied making any statement to Fowler other than "that he did not do the shooting."

As stated above, the question of whether a statement is made voluntarily is one of law and should be determined by the trial judge. Hale v. State, 420 So.2d 821 (Ala.Crim.App.1982). "Even where there is credible testimony to the contrary, if the evidence is fairly capable of supporting the inference that the rules of freedom and voluntariness were observed, the ruling of the trial judge need only be supported by substantial evidence and not to a moral certainty." Bennett v. State, 409 So.2d 936

(Ala.Crim.App.1981), cert. denied, 409 So.2d 936 (Ala.1982); Snider v. State, 422 So.2d 807 (Ala.Crim.App.1982); McNair v. State, 50 Ala.App. 465, 280 So.2d 171 (1973).

It is clear from a review of the transcript that the trial judge correctly allowed the statements of the appellant into evidence as being understandingly and voluntarily made. Once the statements were admitted into evidence, "the jury may consider the circumstances in which the confession was obtained and the way by which it was elicited in determining the credibility of the evidence and the weight to which it is given in reaching their decision." Snider, supra; Lewis v. State, 295 Ala. 350, 329 So.2d 599 (1976).

IV

The appellant contends that the trial court erred by improperly limiting his cross-examination of Shirley Franklin.

"Trial judges have unlimited discretion to cut off questions on

cross-examination which are repetitious, concern wholly collateral matters, are irrelevant, or are harassing, annoying, or humiliating." Atwell v. State, 354 So.2d 30, 39 (Ala.Crim.App.1977), cert. denied, 354 So.2d 39 (Ala.1978); Tombrello v. State, 421 So.2d 1319 (Ala.Crim.App. 1982); Webb v. State, 455 So.2d 223 (Ala.Crim.App.1984). Such a determination by the trial court will not be reversed by this court unless the record reveals a clear abuse of discretion by the trial court. Coburn v. State, 424 So.2d 665 (Ala.Crim.App.1982); Maund v. State, 361 So.2d 1144 (Ala.Crim.App.1978); Turner v. State, 48 Ala.App. 754, 265 So.2d 885 (1972).

"The trial judge is vested with discretion in the conduct of a trial, and the appellate courts will not interfere unless there has been an abuse of discretion. The trial judge has a duty to move the testimony expeditiously along. Shelton v. State, 384 So.2d 869 (Ala.Cr.App.), cert. denied, 384 So.2d 871 (Ala.1980)." Tombrello, supra at

1322; Turner v. State, 473 So.2d 639 (Ala.Crim.App.1985). "Furthermore, on appeal the party claiming an abuse of the trial judge's discretion bears the burden of persuasion. Hembree, supra; Connell v. State, 294 Ala. 477, 318 So.2d 710 (1974); Alford v. State, 30 Ala.App. 590, 10 So.2d 370 (1942)." Turner, supra at 642.

An examination of the record clearly shows that no reversible error was committed by the trial court as argued by defense counsel. He argues that the trial court prohibited him from making full objections to the court (R. 388-390), that the trial court inferred that his questions were improper and the examination too long (R. 414); that the trial court limited his right to speak to the court and that the trial court interrupted without prior objection by the State. (R. 405, 409).

After careful examination of the record, we can find no objectionable behavior by the trial judge. In no instance did he

place any restrictions on defense counsel's right to a thorough and sifting cross-examination. The instances complained of by the appellant were certainly not restrictive of his rights. On page 388-390 of the record, he was allowed to make his full objection to the court, then asked to sit down after he kept discussing the matter. The trial court finally quieted defense counsel after several pages of argument in the record. He complains that on page 405 of the record the court interrupted without advance objection by the State. Defense counsel was trying to elicit repetitious information in this instance. Wright v. State, 49 Ala.App. 539, 274 So.2d 95 (1973). Certainly this is not objectionable behavior for the trial court. He argues that the trial court again interrupted without prior objection by the State on page 414. An examination of this instance reveals that the State had objected on page 413, that argument was going on between the court and the

attorneys for both sides which this "interruption" was a part of. Again, appellant's argument is wholly without merit, as it is with the other instances complained of in brief on this point. The trial judge imposed no restrictions whatsoever on defense counsel and his cross-examination of Shirley Franklin which would amount to an abuse of discretion. Wright, supra and authorities cited.

V

The appellant contends that the conduct of the trial court throughout the trial prejudiced the jury against the appellant and, therefore, reversible error occurred.

An examination of the entire record reveals that the bulk of this appellant's objections were sustained by the trial court. It is equally clear that the trial judge did not single out the defense attorneys in his conduct of the trial. The record indicates that the trial judge treated both sides

fairly although he did seem to admonish each side a number of times.

The determination of the prejudicial character of improper conduct and comments of a trial judge in most cases depends on the issues, parties, and general circumstances of each case. While a particular remark by the trial judge may be open to question, in order for it to amount to grossly improper error requiring reversal, it must have influenced the result of the case. McCovery v. State, 365 So.2d 358 (Ala.Crim.App.1978); Lokos v. State, 434 So.2d 818 (Ala.Crim.App.1982), aff'd, 434 So.2d 831 (Ala.1983); Oglen v. State, 440 So.2d 1172 (Ala.Crim.App.), cert. denied, 440 So.2d 1177 (Ala.1983); Smith v. State, 447 So.2d 1327 (Ala.Crim.App.1983), aff'd, 447 So.2d 1334 (Ala. 1983). This court has held that the trial court which, when witnesses were being examined, made statements to the effect that it had other cases to try, that the attorneys didn't have time to keep coming up to the bench, and that

they should move on as fast as possible, was acting with absolute impartiality in its remarks and such remarks were not prejudicial. Warren v. State, 382 So.2d 636 (Ala.Crim.App.1980). See also Hinkle v. State, 50 Ala.App. 215, 278 So.2d 218 (1973).

The trial judge's admonitions to counsel and his overall conduct of the trial was not prejudicial to the defendant and did not transcend his authority on any duty resting upon him. An examination of the entire record fails to show that the trial judge abused his authority. See Smith, supra; Sprinkle v. State, 368 So.2d 554 (Ala.Crim.App.1978), writ quashed, 368 So.2d 565 (Ala.1979).

Moreover, the trial judge gave cautionary instructions to the jury not to allow his conduct to affect their verdict. Such action is sufficient to purge the taint of any prejudice that his actions might have caused. Oglen, supra.

VI

Appellant argues that the pre-sentence report was inadmissible at the sentence hearing. He cites a number of reasons as to why the report should not have been considered by the trial court. Among these reasons are that the report included hearsay, that the summary of the crime was prejudicial, that he was prejudiced by the inclusion of a statement made by him to the probation officer, that the criminal history section was prejudicial, and that he did not have adequate notice of the report to refute the allegations contained therein.

It is clear to this court that the report is entirely consistent with Alabama's capital murder statute regarding evidence to be considered in sentencing. Section 13A-5-45(d), Code states, "[a]ny evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided

the defendant is accorded a fair opportunity to rebut any hearsay statements." Further, the report itself is an out-of-court statement and is entirely hearsay. However, it is admissible under § 13A-5-47 Code of Alabama, being specifically called for consideration by the trial court.

It is equally clear to this court that the summary of the offense contained in the pre-sentence report was not prejudicial to this appellant. He argues that this summary contained an opinion as to his culpability in the crime in question. This argument is without merit. The appellant's culpability was established by the jury's verdict of guilt. Further, the summary of the offense is consistent with the evidence presented by the State and with the appellant's own statement which was admitted into evidence at trial. The appellant was not prejudiced by this information.

The argument by the appellant that he was prejudiced by the inclusion of a

statement made by him to the probation officer when it was not shown that such statement was voluntary or preceded by Miranda warnings is likewise without merit. The statement is entirely consistent with, and identical to, the appellant's own testimony at the guilt phase of the trial and during the sentence hearing.

The appellant contends that the inclusion in the pre-sentence reports' criminal history section of charges that had not resulted in convictions was reversible error. However, Rule 3(b)(2), Alabama Temporary Rules of Criminal Procedure, specifies that the pre-sentence report may contain the "defendant's prior criminal and juvenile record, if any." It is clear that the inclusion of charges that did not result in convictions is proper because the Rule allows for juvenile charges to be included. It is well settled that juvenile charges, even those that result in an adjudication of guilt, are not convictions and may not be

used to enhance punishment. See Baldwin v. State, 456 So.2d 117, 125 (Ala.Crim.App.1983), aff'd, 456 So.2d 129 (Ala.1984), aff'd, 472 U.S. 372, 105 S.Ct. 2727, 86 L.Ed.2d 300 (1985). The inclusion of the charges in no way prejudiced the appellant. The trial judge did consider some of the charges listed, but only those which had resulted in convictions. (CR. 16).

The appellant's argument that he was afforded insufficient notice of the pre-sentence report is without merit. A review of the record and proceedings reveals that defense counsel received a copy of the report at least one day prior to the trial judge's sentence hearing. A further review of the proceedings indicates that the appellant did not deny any of the assertions contained within the report. The appellant was not prejudiced by the one day notice.

VII

The appellant contends that the trial court erred in its findings or lack of findings of mitigating circumstances.

Appellant first contends that the trial court erred in failing to find that he had no significant history of prior criminal activity. A review of the pre-sentence report reveals that the appellant had some fourteen prior misdemeanor convictions. Such are sufficient to negate this mitigating circumstance. See Jackson v. State, 459 So.2d 963 (Ala.Crim.App.), aff'd, 459 So.2d 969 (Ala.1984), cert. denied, 470 U.S. 1034, 105 S.Ct. 1413, 84 L.Ed.2d 796 (1985); Murry v. State, 455 So.2d 53 (Ala.Crim.App.1983), rev'd on other grounds, 455 So.2d 72 (Ala.1984).

Appellant further argues that the trial court erred in considering, in regard to the finding that this mitigating circumstance did not exist, the appellant's admission to a jailor that he had committed

other armed robberies. It should be noted that the trial court also noted that the appellant had not been convicted of any prior felony offenses. Based on the finding of the other offenses which were more than sufficient to negate this circumstance, we fail to see how this has harmed this appellant. This court has held on at least one prior occasion that the inclusion of an improper aggravating circumstance should be considered harmless error. Indeed, the Supreme Court of the United States reached this very result in Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). Since the mitigating circumstance would have been negated even without consideration of this information, it is clear that its inclusion was harmless.

Appellant argues that the trial court erred in refusing to find as a mitigating circumstance that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law

was substantially impaired. The trial court based his decision on two reasons: (1) Any impairment was due to voluntary intoxication by alcohol or drugs; and (2) since the commission of the offense the appellant has been able to clearly relate the material events of the offense. (CR. 17).

Furthermore, as pointed out by the trial judge, a number of psychiatrists have examined this appellant and there was no finding that the appellant was suffering from any mental disturbance of such severity to compromise his ability to appreciate the criminality of his conduct or to conform his behavior to the requirements of the law on the occasion of the commission of the offense at issue. We agree with the trial court that voluntary intoxication will not constitute grounds for the mitigating circumstance in this cause. The appellant simply did not show that he was so intoxicated as to have rendered himself incapable of appreciating his conduct. Even if he had shown this,

intoxication is no defense to the crime in question. The trial judge was correct in his holding.⁶

The appellant contends that his age should have been considered a mitigating circumstance. This appellant was 25 years of age at the time of the crime. The refusal to find this age to be a mitigating factor was proper. See Ex parte Lindsey, 456 So.2d 393 (Ala.1984), cert. denied, 470 U.S. 1023, 105 S.Ct. 1384, 84 L.Ed.2d 403 (1985); Tomlin v. State [Ms. 1 Div. 23, Nov. 14, 1985] (Ala.Crim.App.1985).

The appellant argues that the trial court erred in refusing to find as a nonstatutory mitigating circumstance the appellant's history of drug and alcohol abuse. The trial court considered all evidence presented by the appellant. The fact that he refused to find as a mitigating circumstance the voluntary drug and alcohol

⁶ See trial court's order hereto attached and made a part hereof as Appendix A.

abuse does not create reversible error. The trial judge simply did not view this behavior, as well as his unstable life, as a mitigating factor. It was within his discretion to so find. See Cochran v. State 500 So.2d 1161 (Ala.Crim.App.1984), rev'd on other grounds, 500 So.2d 1179 (Ala.1985); Dobbert v. Strickland, 718 F.2d 1518 (11th Cir.1983); Moore v. Balkcom, 716 F.2d 1511 (11th Cir.1983). This decision is not error.

VIII

As required by § 13A-5-53(a), Code of Alabama 1975, this court must review the propriety of the imposition of the death penalty in this case. Our review must include a determination of the following questions:

- (1) Was any error adversely affecting the rights of the defendant made in the sentence proceedings?
- (2) Were the trial court's findings concerning the aggravating and

mitigating circumstances supported by the evidence?

(3) Was death the proper sentence in this case?

As to the first question, we have reviewed the sentence proceedings and have found no error adversely affecting the appellant's rights. We are also satisfied that the trial court's written findings concerning the aggravating and mitigating circumstances are fully supported by the evidence. See Appendix A.

To answer the question of whether the death penalty was properly imposed in this case, we must determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or other arbitrary factor;

(2) Whether an independent weighing of the aggravating and mitigating circumstances at the appellate level

indicates that death was the proper sentence; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Alabama Code § 13A-5-53(b) (1975); See also Beck v. State, 396 So.2d 645 (Ala.1981).

There is nothing in the record before us which even intimates that the death penalty was imposed under the influence of passion, prejudice, or other arbitrary factor.

Our independent weighing of the aggravating and mitigating circumstances leaves us with no doubt that the death penalty was appropriate in this case. The mitigating circumstances did not outweigh the aggravating circumstances. Our review of this cause reveals the following aggravating circumstances: (1) the defendant committed this crime while engaged in or was an

accomplice in the commission of, or attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary, or kidnapping, § 13A-5-49(4), Code of Alabama 1975; and (2) that the offense was especially heinous, atrocious or cruel, § 13A-5-49(8), Code of Alabama 1975. When the circumstances surrounding the victim's death are considered, it becomes apparent that the eighth aggravating circumstance was present. The appellant forced the victim into a well, shot into the well a number of times, i.e., possibly as many as 15, and left the victim in the well. The victim at that time was either dead or wounded. The appellant then came back to the well a short while later and shot into the well some seven more times. The death of the victim in this cause was, in fact, unnecessarily torturous and exhibited a consciousnessless or pitiless action on the part of this appellant.

In regard to the final determination we must make, we find that the death penalty

imposed on the appellant is not excessive or disproportionate to the penalty imposed in similar cases. See e.g., Baldwin v. State, 456 So.2d 117 (Ala.Crim.App.1983), aff'd, 456 So.2d 129 (Ala.1984), cert. granted, 469 U.S. 1085, 105 S.Ct. 589, 83 L.Ed.2d 699 (1984); Coulter v. State, 438 So.2d 336 (Ala.Crim.App.1982), aff'd, 438 So.2d 352 (Ala.1983); Raines v. State, 429 So.2d 1104 (Ala.Crim.App.), aff'd, 429 So.2d 1111 (Ala.1982).

We have searched the record as required by Rule 45A, A.R.A.P., and have found no error which adversely affected the rights of the defendant. The sentence of death was proper in this case. Therefore, the judgment of the trial court is due to be and is, hereby, affirmed.

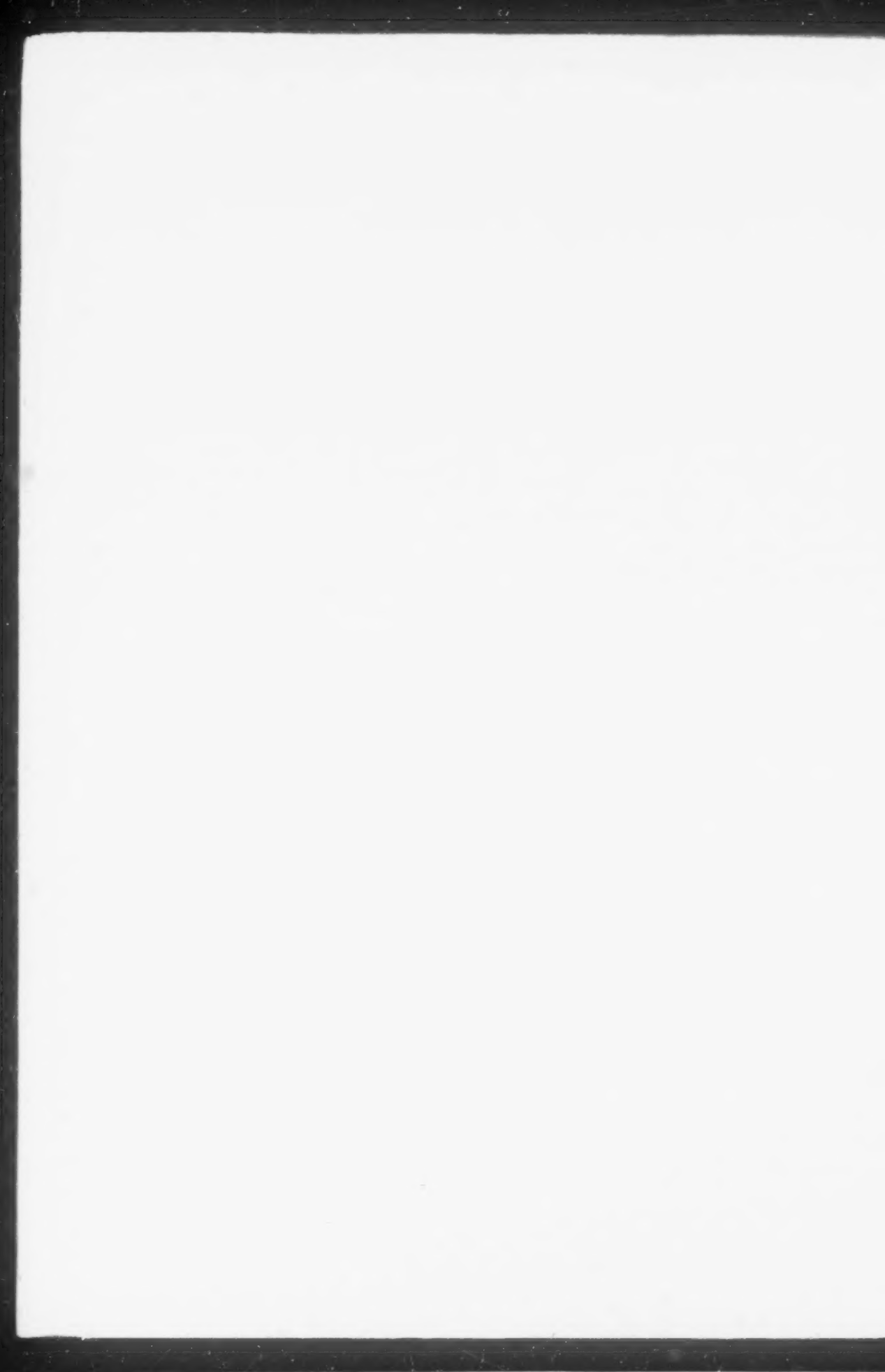
Affirmed.

All the Judges concur.

APPENDIX A

THE APPENDIX TO THE OPINION OF THE COURT OF
CRIMINAL APPEALS IS REPRODUCED HEREIN AS
DOCUMENT NUMBER 6.

DOCUMENT NUMBER 6



that the arguments and presentation of evidence would proceed as provided under Title 13A-5-47 of 1975 Code of Alabama. The State of Alabama thereafter advised the Court that the State was relying on aggravating circumstances as follows:

(1) The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit rape, robbery, burglary or kidnapping.

(2) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(3) The capital offense was committed for pecuniary gain.

(4) The capital offense was especially heinous, atrocious or cruel compared to other capital offenses.

The District Attorney then offered in support of said aggravating circumstances the

transcript of all testimony offered at the trial of said cause and in addition thereto any and all testimony offered at the sentencing phase of the hearing held before the jury.

The defendant was then given an opportunity to offer any testimony or evidence concerning any mitigating circumstances. This Court did place in the record a copy of the written presentence investigation report prepared by the Probation Officer, a copy of which had previously been furnished to the defendant and/or his counsel.

In support of mitigating circumstances, the defendant called as a witness, William D. Hurst, Jailor of the Blount County Jail. Witness Hurst testified with regard to the repentant attitude of the defendant and to the fact that the defendant had been most cooperative and in effect, a model prisoner since being incarcerated in the jail. There was also introduced a poem which has been composed by the defendant

which also expressed the defendant's repentance. The witness also related certain voluntary statements that had been made to him by the defendant concerning other armed robberies committed by him prior to this offense. Thereafter, the defendant, Michael Eugene Thompson, was called to testify in his own behalf. Defendant stated that he did not intend to call any other members of his family to testify in his behalf due to the fact that he did not wish to cause them any additional suffering over this case. The defendant related his age to be twenty-five years. The defendant also testified as to the difficulties of his early life, being brought up in a poor family and also to the fact that his father was killed by gunshot when he was sixteen years of age and that he had harbored some guilt feelings over the events surrounding his father's death. The defendant testified as he did at the trial of his long time use of alcohol and drugs.

At the conclusion of the testimony counsel for the State of Alabama and both counsels for the defendant were allowed to make closing arguments concerning aggravating and mitigating circumstances and imposition of sentence. At the conclusion of argument the defendant was called before the bench in the presence of his counsel. This Court stated to the defendant that the jury had heretofore found the defendant guilty of the capital offense as set out in count one of the indictment and that now this Court does hereby find the defendant guilty of the capital offense as set out in count one of the indictment and asked the defendant if he had anything to state to this Court before the imposition of sentence. The defendant stated as follows:

"I would like to say that I have done a lot of wrong in my life, I know I have, alcohol and drugs is what caused it, but I didn't shoot that woman, I didn't shoot her. I robbed the store and I know I need to pay

for what I've done, but I didn't kill that woman. That's all I've got to say."

SUMMARY OF FACTS

This Court finds that on the night of December 10, 1984, that the defendant, Michael Eugene Thompson while armed with a .22 caliber pistol did proceed to the Majik Mart in Attalla, Alabama in which the victim Maisie Gray was employed. Maisie Gray being the only employee present at that time. The defendant at gun point, robbed the Majik Mart by emptying the cash register. The defendant then forced the victim Maisie Gray to leave in his company with the victim driving his automobile. The victim remained in the company of the defendant for quite some time, possibly several hours. The defendant some time during the night, possibly in the early morning hours of the next morning, carried the victim to a well in Blount County. According to the defendant's own statements, he kicked or pushed the victim into the well and according to his statement, he proceeded

to shoot into the well several times and then left and proceeded to the home where he was staying with his girl friend. He there, secured additional ammunition for his pistol and persuaded his girl friend to go with him back to the well. The defendant then shot into the well numerous other times, possibly twelve or fifteen times. The defendant, who he testified in said cause, recanted the statement previously made to the Sheriff and stated on the witness stand that the shots that were fired into the well were done by his girl friend.

Thereafter, the defendant and his girl friend returned to her home and the next day the defendant took the pistol, put in a plastic bag and threw same into another well at a different location. The body of the victim remained in the well until the 5th day of January, 1985, at which time it was discovered and was recovered on the 6th day of January in a decomposed state. As result of the statement made by the defendant, the

pistol used in the shooting was recovered from the other well. It was later determined and testified to by officials from the Department of Forensic Science that the cause of death of the victim was gunshot wounds.

This Court has considered all of the relevant testimony relating to aggravating circumstances as set out in Title 13A-5-49 of the Code of Alabama and all of the mitigating circumstances as set out in Title 13A-5-51 of the Code of Alabama and has also considered all matters of mitigation in addition to those enumerated in 13A-5-51.

AGGRAVATING CIRCUMSTANCES

Even though the State of Alabama in their presentation said that they were relying on the aggravating circumstances that the capital offense was committed for the purpose of avoiding a lawful arrest, or perfecting an escape therefrom, (13A-5-49) (5) and also the capital offense was committed for pecuniary gain (13A-5-49) (6), the Court finds that these two aggravating

circumstances would not apply to the facts of this case. The Court also finds that there was no evidence that would support the finding of aggravating circumstances under 13A-5-49 Subsections 1, 2, 3 and 7. (1) That the capital offense was committed by a person under sentence of imprisonment. (2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person. (3) The defendant knowingly created a great risk of death to many persons. (7) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

This Court, herein has enumerated the facts surrounding the commission of the offense, and the facts are undisputed that the defendant, on the night of December 10, 1984, robbed the Majik Mart and kidnapped the victim Maisie Gray and that the victim was later murdered. Therefore, this Court does find as an aggravating circumstances that the

capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping.

This Court has also in the finding of facts enumerated the circumstances surrounding the death of the victim. This Court is cognizant of the fact that in order to find an aggravating circumstances as being especially heinous, atrocious or cruel compared to other capital offenses that the circumstances surrounding the death must be in the nature of tortuous, consciousnessless or pitiless. The victim Maisie Gray some time after having been kidnapped, was placed in the trunk of defendant's automobile and remained in the trunk of the automobile possibly for several hours while the defendant contemplated what to do with the victim. The victim was shoved into the well in the dead of night and if she had not been

shot and was left to remain in the well would have no doubt died from that fact alone. However, after shooting into the well, the defendant was not able to continue shooting due to the fact that his ammunition was gone. The victim was left in the well, at that time either dead or wounded, while the defendant went to his home for the purpose of acquiring additional ammunition and upon returning, shot into the well an additional twelve to fifteen times and the victim's death was caused by gun shot wounds inflicted by the defendant either at the first or later occasion or both. Considering all of the evidence and circumstances surrounding the victim's death, this Court finds that the death of the victim was consciousless or a pitiless homicide which was unnecessarily tortuous to the victim. It is therefore the finding of this Court that the capital offense was especially heinous, atrocious or cruel compared to other offenses.

MITIGATING CIRCUMSTANCES

This Court has considered all of the mitigating circumstances as enumerated in Title 13A-5-51 and this Court finds no evidence that would justify a finding of any of the enumerated mitigating circumstances.

The defendant specifically relied on the mitigating circumstances that the defendant had no significant history of prior criminal activity. This Court disagrees. The Court realizes that the defendant's record does not contain a significant history of felony convictions, however, during the period of time from August, 1977 to May, 1984, the defendant was convicted of nineteen misdemeanors and one youthful offender offense for which he was sentenced to three years and three years probation. Some of the offenses even though misdemeanors, involved crimes of moral turpitude. The defendant also made a voluntary statement to the Jailor while incarcerated on this offense, that he had committed other armed robberies.

This Court does not find that the capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

This Court does not find the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

With regard to the two previously stated mitigating circumstances, the only evidence offered by the defendant was the defendant's own statement that on the night of the commission of the offense that he claimed that he had been taking drugs and alcohol. However, any use of drugs or alcohol on this occasion was voluntary and at all times since the commission of the capital offense the defendant has been able to clearly relate and recall the material events that occurred prior to, during and after the commission of the capital offense.

The defendant was also examined by psychiatrists from Bryce Hospital and later examined by an independent psychiatrist selected by the defendant and/or his attorneys. In all the reports submitted by the psychiatrists for the information of this Court, there was no finding that the defendant was suffering from any mental disturbance of such severity to compromise his ability to appreciate the criminality of his behavior or to conform his behavior to the requirements of law on the occasion of the commission of the capital offense.

This Court does not find that the victim was a participant in the defendant's conduct or consented to it.

The Court does not find that the defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor. According to the facts summarized above, it is clear in this Court's mind that the

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defendant's participation was certainly not minor.

This Court does not find that the defendant acted under extreme duress or under the substantial domination of another person.

The defendant has specifically relied on one of the mitigating circumstances as the age of the defendant. The defendant is a white male, twenty-five years of age, well developed mentally and physically, with no apparent impairments. The defendant testified in his own behalf. The defendant appears to have matured to his age level and has at least average intelligence. This Court therefore does not find the age of the defendant as a mitigating circumstance.

At the sentence stage hearing before this Court, the defendant has exhibited a repentant attitude and at this stage of the proceedings was certainly concerned over the suffering that had been imposed on the victim and the members of the victim's family and also to the members of his own family. This

Court does therefore consider this to be a mitigating circumstances.

This Court having considered all of the statutory mitigating circumstances, and any additional mitigating evidence offered by the defendant, and after consideration of all of the matters that were presented to the Court during any of the hearings both in mitigation and aggravation, and taking into consideration all the other matters that were properly before the Court as hereinabove stated, this Court now does find and is convinced, beyond a reasonable doubt and to a moral certainty that the aggravating circumstances as shown above and brought before this Court outweigh any mitigating circumstances as shown above and that the aggravating circumstances are sufficient to uphold the jury's finding of punishment at death.

It is therefore the judgment of this Court, that the recommendation by the jury, that the defendant be punished by death is

accepted by this Court. This Court has heretofore this date in open Court, found the defendant guilty and sentenced the defendant to death.

Therefore, be it ORDERED, ADJUDGED and DECREED by this Court, that the defendant, Michael Eugene Thompson, at a date to be determined by the Appellate Court hereafter, within the walls of William C. Holman Prison at Atmore, Alabama or such other place that might be hereafter designated by the laws of this State, and in the manner and method as provided in Title 15-18-82 Code of Alabama, 1975, that the defendant shall suffer the penalty of death and that his death shall be caused by a current of electricity passing through his body of sufficient intensity to cause death and the application and continuance of such current through defendant's body shall continue until death does in fact occur therefrom. The defendant was advised that he is entitled to an automatic appeal. The

defendant having herefore been determined an indigent, be it ORDERED that the Honorable B.J. McPherson and the Honorable John Dobson be and are hereby appointed attorneys for the defendant on appeal.

Be it further ORDERED that the defendant be placed in custody of the Sheriff of Blount County and hat the Sheriff be directed to transfer the defendant to the custody of the Warden of Holman Prison. The defendant shall remain in the custody of the Warden of Holman Prison until such time as the sentence of this Court is carried out or subject to further orders of this Court.

Defendant's attorneys in open Court, gave notice of appeal. Be it ORDERED that the defendant be held without bond pending appeal.

This the 11th day of June 1985.

/s/ H. E. Holladay Judge

DOCUMENT NUMBER 7

STATE OF ALABAMA
IN THE CIRCUIT COURT BLOUNT COUNTY
CASE NO. CC85-060

STATE OF ALABAMA PLAINTIFF

VS.

MICHAEL E. THOMPSON DEFENDANT

JUNE 11, 1985

JUDGMENT ENTRY

Comes the State of Alabama by its District Attorney, Honorable Fitzhugh Burttram, also comes the defendant, Michael Eugene Thompson, in his own proper person and with his attorneys, Honorable B. J. McPherson and Honorable John Dobson, and after being duly arraigned in open Court upon an Indictment on a charge of Capital Murder, for his plea thereto says he is not guilty. Issue is joined.

Thereupon comes a jury of good and lawful men and women, to-wit: Donny Thomas, and eleven other, who being duly empaneled, sworn and charged by the Court according to law, before whom the trial of the cause was



entered upon (continued from day to day and from time to time,) said defendant, Michael Eugene Thompson, and his attorneys, Honorable B.J. McPherson and Honorable John Dobson, being in open Court at each and every stage and during all of the proceedings in this cause, now on this the 10th day of May, 1985, said upon their oaths do say: "We, the jury, find the defendant, Michael Eugene Thompson, guilty of capital murder as charged in count one of the indictment."

This Court hereby sets the 11th day of June, 1985 at 9:00 a.m. for sentence hearing before this Court. Be it ORDERED that the Probation Officer shall forthwith prepare a pre-sentence report to be report to be considered by this Court at the time of pre-sentence hearing. Be if further ORDERED that a copy of said report be furnished to the District Attorney and to the attorneys for the defendant prior to sentence hearing. That said report shall be furnished in ample

time to give the defendant an opportunity to refute or offer any evidence concerning all.

This being the date to which this caused was passed for sentencing of defendant Michael Eugene Thompson.

The defendant, Michael Eugene Thompson, being in open Court, and with his attorneys Honorable B. J. McPherson and John Dobson, and the Court having access to the report of the State Board of Pardons and Parole.

Thereupon, the defendant, Michael Eugene Thompson, and with his attorneys, Honorable B. J. McPherson and Honorable John Dobson, being in open Court and being asked by the Court if he has anything to say why the sentence of the law should not be pronounced upon him, says nothing. It is therefore considered by the Court, and is the judgment and sentence of the Court, that the defendant, Michael Eugene Thompson, be punished by death as punishment of his crime

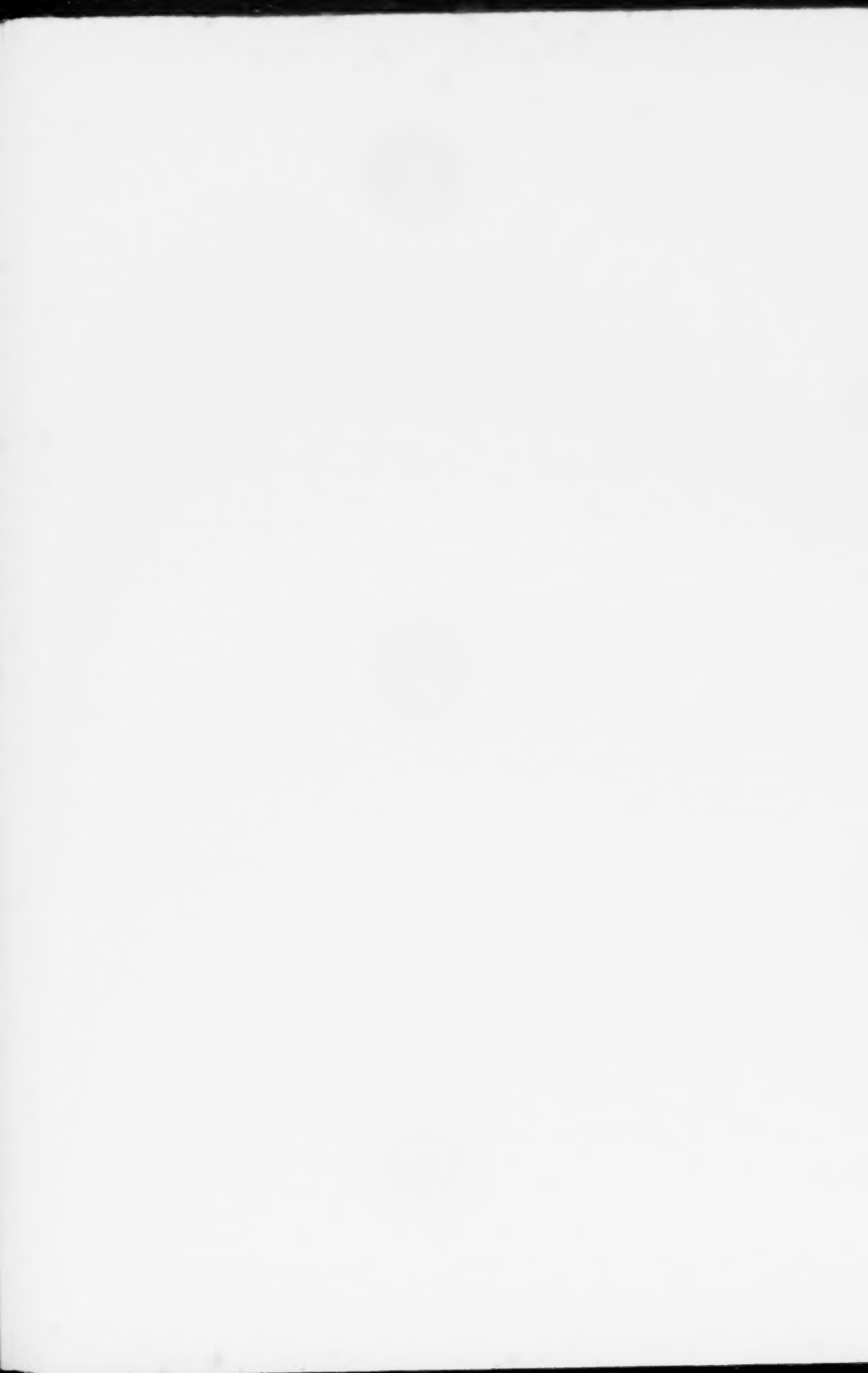
The defendant was advised that he is
entitled to an automatic appeal.

This the 11th day of June, 1985.

/s/ H. E. Holladay, Judge.

Fifth Amendment to the Constitution of the
United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. Const. Amend. V



Sixth Amendment to the Constitution of the United States:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and the district wherein the crime shall have been committed, and which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense. U.S. Const Amend. VI.

Fourteenth Amendment to the Constitution of the United States:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. XIV, §1.

DOCUMENT NUMBER 9



Code of Alabama, 1975, Title 15, Criminal Procedure, Chapter 12, Defense of Indigents, Article 2, Appointed Counsel, §15-12-21, Appointment and compensation of counsel -- Trial court:

(a) If it appears to the trial court that such defendant is entitled to counsel, that such defendant does not expressly waive the right to assistance of counsel and that such defendant is not able financially or otherwise to obtain the assistance of counsel, the court shall appoint counsel to represent and assist the defendant; and it shall be the duty of such appointed counsel, as an officer of the court and as a member of the bar, to represent and assist said defendant.

(b) If it appears to the trial court in a delinquency case, need of supervision case or other judicial proceeding in which a juvenile is a party, that said juvenile is entitled to counsel and that such juvenile is not able financially or otherwise to obtain

the assistance of counsel or that appointed counsel is otherwise required by law, the court shall appoint counsel to represent and assist the juvenile or act in the capacity of guardian ad litem for such juvenile; and it shall be the duty of such appointed counsel, as an officer of the court and as a member of the bar, to represent and assist said juvenile.

(c) If it appears to the trial court that the parents, guardian or custodian of a juvenile who is a party in a judicial proceeding, are entitled to counsel and such parties are unable to afford counsel, upon request the court shall appoint counsel to represent and assist such parents, guardian or custodian; and it shall be the duty of such appointed counsel, as an officer of the court and as a member of the bar, to represent and assist said parties.

(d) Counsel appointed in cases described in subsections (a), (b) and (c) above, including such cases tried de novo in

circuit court on appeal from a juvenile proceeding, shall be entitled to receive for their services a fee to be approved by the trial court. The amount of such fee shall be based on the number of hours spent by the attorney in working on such case and shall be computed at the rate of \$40.00 per hour for time expended in court and \$20.00 per hour for time reasonably expended out of court in the preparation of such case. The total fees to any one attorney in any one case, from the time of appointment through the trial of the case, including motions for new trial, shall not, however, exceed \$1,000.00, except as follows: In cases where the original case involves a capital offense or a charge which carries a possible sentence of life without parole, the limits shall be \$1,000.00 for out-of-court work, plus payment for all in-court work, said work to be billed at the aforementioned rates. Counsel shall also be entitled to be reimbursed for any expenses reasonably incurred in such defense to be

approved in advance by the trial court.

Retrials of a case shall be considered a new case.

(e) Within a reasonable time after the conclusion of the trial or ruling on a motion for a new trial or after an acquittal or other judgment disposing of the case, counsel shall submit to the trial court a bill for services rendered, not to exceed the amount provided in subsection (d) of this section, and such bill, if approved by the trial court, shall be submitted by the clerk of the court to the state comptroller for audit and allowance and, if approved by the comptroller, shall be forwarded to the state treasurer for payment.

Code of Alabama, 1975, Title 15, Criminal Procedure, Chapter 12, Defense of Indigents, Article 2, Appointed Counsel, §15-12-22, Same -- Appeals.

(a) In all criminal cases wherein a defendant has been convicted of a serious offense in which an appeal lies directly to the supreme court or court of criminal appeals and the defendant expresses his desire to appeal such conviction, the court shall cause to be entered upon its minutes a recital of notice of appeal, and the court shall then ascertain and make findings in reference to the appeal concerning those items listed in § 15-12-20.

(b) If it appears that the defendant desires to appeal and is unable financially or otherwise to obtain the assistance of counsel on appeal and the defendant expresses the desire for assistance of counsel, the trial court shall appoint counsel to represent and assist the defendant on appeal. The presiding judge of the court to which the

appeal is taken shall have authority to appoint counsel in the event the trial court fails to appoint and in the event it becomes necessary to further provide for counsel. It shall be the duty of such counsel, as an officer of the court and as a member of the bar, to represent and assist such defendant in the appeal.

(c) If it appears that a juvenile who is a party to an appeal is otherwise required by law or by rule of court to be represented by appointed counsel, the trial court shall appoint counsel to represent and assist such juvenile on appeal. The presiding judge of the court to which the appeal is taken shall have authority to appoint counsel in the event the trial court fails to appoint and in the event it becomes necessary to further provide for counsel. It shall be the duty of such counsel, as a officer of the court and as a member of the bar, to represent and assist such juvenile in the appeal.

(d) Counsel appointed to defend any indigent defendant for the appeal from a decision in any criminal or juvenile proceeding, excluding cases tried de novo in circuit court on appeal from a juvenile proceeding, shall be entitled to receive for their services a fee to be approved by the appellate court. The amount of such fees shall be based on the number of hours spent by the counsel in working on such appeal and be computed at the rate of \$40.00 per hour for time reasonably expended in the prosecution of such appeal, and any subsequent petition for writ of certiorari. The total fees awarded to any one attorney in any not, however, exceed \$1,000.00, and shall be in addition to any fees awarded on the trial court level. In those cases where the state takes a pretrial appeal, appointed counsel shall be entitled to bill separately for services on the pretrial and post-trial appeals, up to \$1,000.00 for each appeal. In those cases where a petition for writ of

certiorari is granted to the Alabama supreme court, counsel shall be entitled to bill separately for all services rendered after the granting of the certiorari petition, up to a separate limit of \$1,000.00 over and above any funds received for services rendered in the court of criminal appeals. Such counsel shall also be entitled to be reimbursed for any expenses reasonably incurred in preparing and handling such appeal, to be approved in advance by the appellate court.

(e) Within a reasonable time after the disposition of the appeal, counsel shall submit to the appellate court a bill for services rendered, not to exceed the amount provided in subsection (d) of this section, and such bill, when approved by the presiding judge or chief justice of the appellate court, shall be submitted by the clerk of the appellate court to the state comptroller for

audit and allowance and, if approved by the
comptroller, forwarded to the state treasurer
for payment.

3
NO. 91-552

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

MICHAEL EUGENE THOMPSON,

PETITIONER,

v.

STATE OF ALABAMA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION
TO CERTIORARI

JAMES H. EVANS
ALABAMA ATTORNEY
GENERAL

SANDRA JEAN STEWART*
ALABAMA ASSISTANT
ATTORNEY GENERAL

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Supreme Court, U.S.
I . . . E D
DEC 12 1991
OFFICE OF THE CLERK



QUESTIONS PRESENTED FOR REVIEW

1. Should this Court grant certiorari to review petitioner's claim that the limitations placed on the amount of compensation that counsel representing indigent capital murder defendants can receive from the State in Alabama are unconstitutional because they result in the ineffective assistance of counsel when this Court lacks jurisdiction over the issue because that issue was not properly raised in the courts below, the issue is clearly unworthy of certiorari review and is completely without merit?

2. Should this Court grant certiorari to review petitioner's claim that the admission of his coerced confession was unconstitutional when this Court lacks jurisdiction over the issue because no federal question is presented, and when the issue is clearly unworthy of certiorari review and is completely without merit?

PARTIES

The caption contains the names of all parties in the courts, below.

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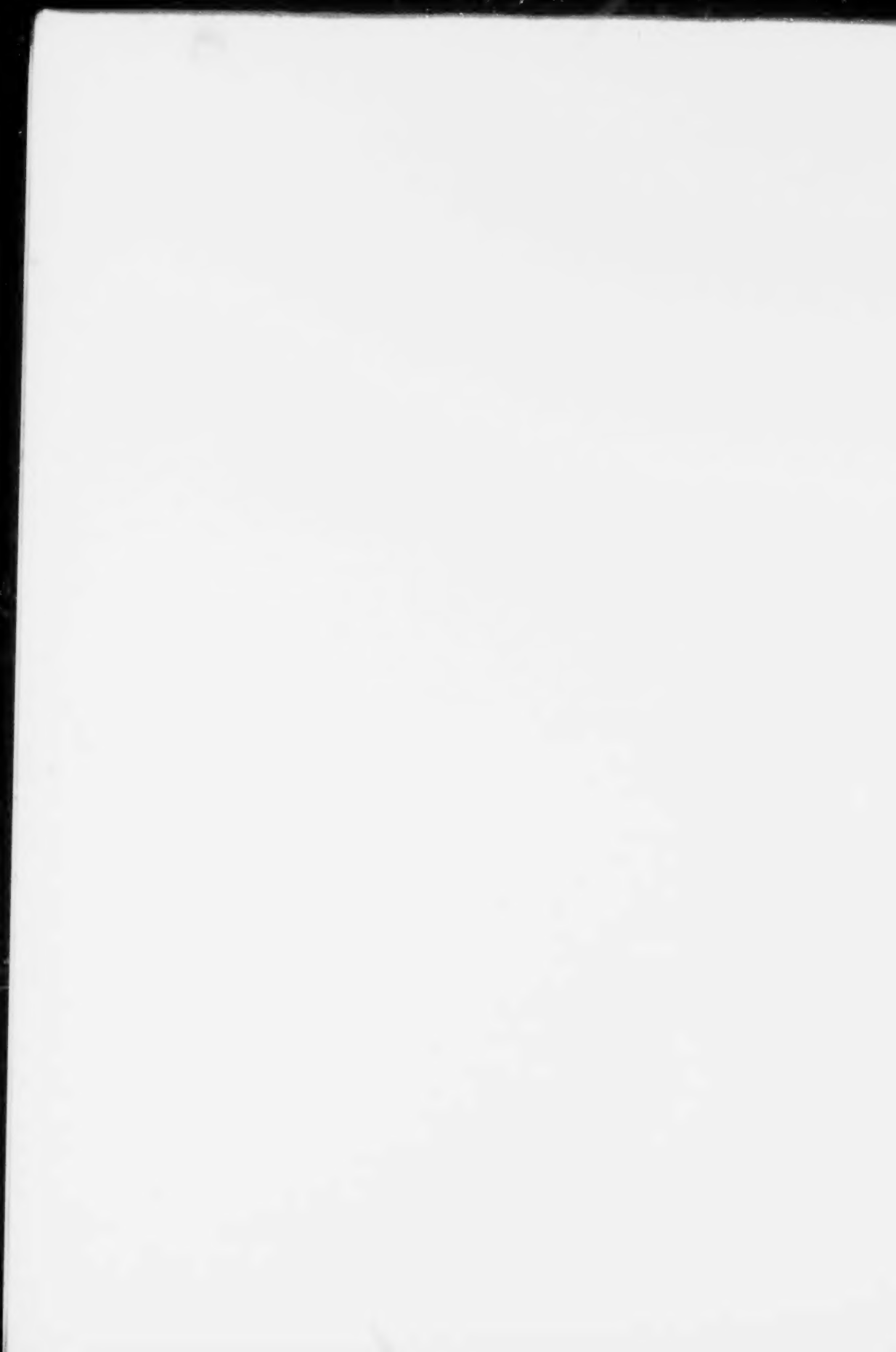
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OPINIONS BELOW

Petitioner Michael Eugene Thompson filed a collateral petition and amended petition for relief from conviction or sentence pursuant to Temporary Rule 20, Alabama Rules of Criminal Procedure, which were denied by the Circuit Court of Blount County, Alabama, on February 15, 1990. The Alabama Court of Criminal Appeals affirmed the denial of relief on January 18, 1991. Thompson v. State, 581 So.2d 1216 (Ala.Cr.App. 1991). (The state collateral trial court's order and memorandum opinion is attached to that opinion as an appendix.) On March 1, 1991, the Alabama Court of Criminal Appeals overruled Thompson's application for rehearing. The Alabama Supreme Court denied Thompson's petition for writ of certiorari to the Alabama Court of Criminal Appeals without opinion on June 21, 1991. Thompson v. State, 581 So.2d

1216 (Ala. 1991). Thompson seeks review of the denial of certiorari by the Alabama Supreme Court.

On direct appeal, the Alabama Court of Criminal Appeals affirmed Thompson's conviction and death sentence. Thompson v. State, 503 So.2d 871 (Ala.Cr.App. 1986). Rehearing was overruled by that court on May 13, 1986. On certiorari in the Alabama Supreme Court, the Alabama Court of Criminal Appeals was affirmed. Ex parte Thompson, 503 So.2d 887 (Ala. 1987). This Court denied Thompson's petition for writ of certiorari to the Alabama Supreme Court. Thompson v. Alabama, 484 U.S. 872 (1987).

JURISDICTION

The decision of the Alabama Supreme Court denying the petition for writ of certiorari was issued on June 21, 1991. Thompson properly filed his petition for

writ of certiorari and brief in support in this Court on October 15, 1991.

This Court does not have jurisdiction over the issues raised because they are not properly before this Court and because argument II does not present a federal question.

CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED

The statement of constitutional provisions and statutes involved in this case, which is contained on page ix of the certiorari petition is correct. In addition, this case involves the following:

Alabama Rules of Criminal Procedure
Temporary Rule 20.2(a)¹ provides:

¹Temporary Rule 20.2(a) of the Alabama Rules of Criminal Procedure is now codified as Rule 32.2(a) of the Alabama Rules of Criminal Procedure. The rules are materially identical in all respects.

Rule 20.2. Preclusion of
remedy.

(a) PRECLUSION OF
GROUNDS. A petitioner will
not be given relief under
this rule based upon any
ground:

(1) Which may still
be raised on direct
appeal under the Alabama
Rules of Appellate
Procedure, or by
post-trial motion under
Temporary Rule 13;

(2) Which was raised
or addressed at trial; or

(3) Which could have
been but was not raised
at trial, unless the
ground for relief arises
under rule 20.1(b)
[jurisdiction]; or

(4) Which was raised
or addressed on appeal
or in any previous
collateral proceeding; or

(5) Which could have
been but was not raised
on appeal, unless the
ground for relief arises
under Rule 20.1(b)
[jurisdiction].

STATEMENT OF THE CASE

A. PRIOR COURT PROCEEDINGS

Petitioner Michael Eugene Thompson kidnapped, robbed and murdered Maisie Carlene Gray on December 10, 1984. The Blount County, Alabama, Grand Jury returned a three count indictment against Thompson for that kidnapping/robbery/murder on January 18, 1985. (C.TR. 19-20)² Counts One and Three of the indictment charged Thompson with the Ala. Code §13A-5-40(a)(1)(1975) capital offense of "[m]urder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant." (C.TR. 19-20) Count Two of

²"C.TR." refers to pages in the clerks record from Thompson's 1985 trial, which is contained in volume I of the transcript from the 1985 trial and which is a part of the record on appeal in this case.

the indictment charged Thompson with the Ala. Code §13A-5-40(a)(2) (1975) capital offense of "[m]urder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant." (C.TR. 19-20)

The case was tried before a jury on May 6-10, 1985. (TR. 8-844)³ The jury found Thompson guilty of murder during a kidnapping in the first degree (TR. 843) and unanimously recommended a sentence of death (TR. 886-888) on May 10, 1985. After a separate hearing on June 11, 1985, the trial judge sentenced Thompson to death. (TR. 889-937)

On direct appeal, the Alabama Court of Criminal Appeals affirmed Thompson's conviction and death sentence. Thompson

³"TR." refers to page numbers in the 1985 trial transcript, which is a part of the record on appeal in this case.

v. State, 503 So.2d 871 (Ala.Cr.App. 1986). Rehearing was overruled by that court on May 13, 1986. On certiorari in the Alabama Supreme Court, the Alabama Court of Criminal Appeals was affirmed. Ex parte Thompson, 503 So.2d 887 (Ala. 1987). This Court denied Thompson's Petition For Writ of Certiorari.

Thompson v. Alabama, 484 U.S. 872 (1987).

Thompson filed a pro se Petition for Relief From Conviction or Sentence pursuant to Temporary Rule 20, Alabama Rules of Criminal Procedure, in the Blount County Circuit Court on January 5, 1988. (CR. 7-8)³ After obtaining a lawyer, Thompson filed an Amended Petition For Relief From Conviction or

⁴"CR." refers to page numbers in the clerk's record from the Rule 20 collateral proceeding, which is contained in volumes 3 and 4 of the transcript of that proceeding and which is a part of the record on appeal in this case.

Sentence pursuant to Temporary Rule 20, Alabama Rules Criminal Procedure, on April 11, 1988. (CR. 17-40) The State filed its Answer to the petition on May 10, 1988. (CR. 41-47) On May 10, 1989, Thompson filed a second amended petition (CR. 80-164), which was answered by the State on May 19, 1989 (CR. 175-200).

On May 23-25, 1989, the state Rule 20 trial court held an evidentiary hearing on Thompson's claims of ineffective assistance of counsel and newly discovered evidence contained in Thompson's Rule 20 petition. (R. 1-517)⁵ The state Rule 20 trial court entered its Opinion and Order denying Thompson relief on February 15, 1990. (CR. 237-298)

⁵"R." refers to page numbers in the Rule 20 evidentiary hearing transcript, which is a part of the record on appeal in this case.

The Alabama Court of Criminal Appeals affirmed the denial of relief on January 18, 1991. Thompson v. State, 581 So.2d 1216 (Ala.Cr.App. 1991). On March 1, 1991, the Alabama Court of Criminal Appeals overruled Thompson's application for rehearing. The Alabama Supreme Court denied Thompson's petition for writ of certiorari to the Alabama Court of Criminal Appeals without opinion on June 21, 1991. Thompson v. State, 581 So.2d 1216 (Ala. 1991).

Thompson filed his brief in this Court on October 15, 1991.

B. STATEMENT OF THE FACTS⁶

In his Rule 20 petition for relief from conviction or sentence, as amended,

⁶The facts supporting Thompson's conviction and death sentence are summarized in the Alabama Court of Criminal Appeals' opinion in the direct appeal of this case. Thompson v. State, 503 So.2d 871, 874-875, 884 (Ala.Cr.App. 1986).

filed in the Blount County, Alabama, Circuit Court, Thompson raised eighteen issues. (CR. 17-40, 80-164) The State of Alabama filed an Answer to the petition, as amended, asserting procedural bar defenses to fifteen of those eighteen claims and denying the three remaining claims. (CR. 41-47, 175-200) After conducting an evidentiary hearing on Thompson's claims, the Blount County Circuit Court (the Rule 20 trial court hereafter) entered an Opinion and Order denying Thompson relief on all of his claims. (CR. 237-298) That Court found that fifteen of Thompson's claims were procedurally barred from review under Temporary Rule 20.2(a), Alabama Rules of Criminal Procedure, including his claim raised in this Court that his confession was not admissible because it was not voluntarily given and it was

taken in violation of Thompson's assertion of his Miranda rights. (CR. 237, 238)

In his Rule 20 petition, Thompson raised twenty-four claims of ineffective assistance of counsel. The Rule 20 trial court found all of those claims to be without merit. (CR. 253-297) The statement of the facts presented by Thompson in his certiorari petition to this Court is inaccurate, incomplete and completely ignores the facts as presented at the Rule 20 hearing and as found by the Rule 20 trial court.

Contrary to the picture painted by Thompson in his certiorari petition, Thompson was represented at trial and on the direct appeal of his case by experienced and competent counsel. The Rule 20 trial court made the following findings of fact which are fully supported by the evidence presented at

the Rule 20 evidentiary hearing and which accurately reflect the representation that Thompson, in fact, received:

Prior to the trial of this case, Thompson's attorneys met with him for more than 20 hours. During some weeks they met with him daily, especially close to trial. Thompson's attorneys also undertook a great deal of investigation and research into the legal issues in this case. Based on conversations with Thompson, the fact that Thompson had confessed, and on the results of the psychiatric examinations, Thompson's trial counsel developed a trial strategy that involved a theory of lesser culpability and putting the State to its burden of proof.

...

Prior to trial, McPherson and Dobson [trial counsel] met with Thompson extensively. In those meetings with Thompson, his trial attorneys discussed trial strategy and his defense with him. Trial procedures were also discussed with Thompson. State's Exhibit 1, which is a transcript of a conversation between Thompson and his attorneys prior to Thompson's trial, which was taped by trial counsel, reveals

that defense decisions were discussed with Thompson. For example, trial counsel discussed with Thompson whether he wanted his statement of the events surrounding the crime, as given to his attorneys, turned over to the sheriff's office. It also reveals that trial counsel explained to Thompson the possible consequences of turning over that statement, which incriminated Shirley Franklin.

The transcript reveals that Thompson's version of the events on the night of the crime were discussed with him in detail; a description given by a witness who was on the scene prior to the victim being reported missing was discussed with him; and, the various motions to be filed were discussed with him. State's Exhibit 1 also reveals that a possible insanity or diminished capacity defense was discussed with Thompson and the procedures required to establish such a defense were explained and discussed with Thompson.

In addition, McPherson and Dobson testified that they met and discussed the trial and Thompson's defense during trial, each morning before trial began, and each evening after proceedings were adjourned. This Court finds

that the testimony of John Dobson and B.J. McPherson that they communicated with Thompson regarding his defense and trial procedures is credible, and that Thompson's testimony to the contrary is not credible. The evidence reveals that trial counsel were very conscientious in their communication with Thompson and in advising him of trial procedures. Thompson has failed to establish that his trial counsel's performance was deficient in their communication with Thompson.

Thompson has also failed to establish that he was prejudiced by any failure of his trial counsel to communicate with him. Thompson presented no evidence that his trial counsel failed to communicate anything to him that would have made a difference in the outcome of his trial. ...

Thompson also has not shown that his trial counsel failed to competently advise him or gave him erroneous advice as to the charges pending against him; the defense strategy; the effect of having Thompson testify during the guilt phase of the trial; the effect of not having Thompson testify before the jury during the penalty phase of the trial; the effect of not having Thompson's mother testify before the judge

immediately prior to sentencing; or the effect of failing to adequately prepare for the penalty phase of the trial.

Thompson presented no evidence that his trial counsel failed to advise, or erroneously advised, Thompson that he was charged with the capital murder of Maisie Carlene Gray, and of the possible consequences of that charge. ...

Trial counsel thoroughly advised and discussed defense strategy with Thompson, including a possible insanity defense as is reflected in State's Exhibit 1. The trial attorneys also explained the difficulty in defending the version of the crime he gave them, considering the fact that he had given a different version in his confessions. ...

Trial counsel were also very diligent in explaining to Thompson the effect of his testifying during the guilt phase of the trial. Again, this is reflected in State's Exhibit 1. Trial counsel explained the problems and possible consequences of Thompson telling a different story in court than he told in his confession. After explaining to Thompson that he had the right to testify or not

to testify, trial counsel advised Thompson to take the stand and testify at the guilt stage of the trial. This advice was reasonable in light of Thompson's wanting the jury to disregard his confession to law enforcement officers; believe that he gave them that story in order to protect his girlfriend, Shirley Franklin; and that it really was Shirley Franklin who actually shot and killed Mrs. Gray. ...

This Court finds that trial counsel did advise Thompson as to the importance of his testifying before the jury during the penalty phase of the trial and the possible effects of his not testifying. Trial counsel advised Thompson to testify at the penalty phase but he refused, telling his trial counsel he "wasn't going to get on the stand and beg those bastards for anything." The trial record also reflects that Thompson was advised of his right to testify and that he did not want to. Thompson's assertions to the contrary are not credible. ...

Thompson presented no evidence on his claim that his trial counsel failed to competently advise him or gave him erroneous advice regarding the effect of not having his mother testify before this Court immediately prior to

sentencing. There is no evidence therefore that his counsel's performance was deficient as to this claim. Furthermore, there was no prejudice from the failure of the mother to testify immediately prior to sentencing. This Court is the same court that heard evidence at both the guilt and penalty stages in the 1985 trial of this case. Thompson's mother, Joyce Parker, testified at the penalty phase of this case as to Thompson's drug and alcohol problems and asked the jury for mercy. This Court heard that testimony and had Mrs. Parker also testified after the jury's recommendation and prior to sentencing before this Court, the sentence imposed would have been the same. Therefore, there is no prejudice from any failure on trial counsel's part to advise Thompson of the effects of his mother taking the stand immediately prior to sentencing.

Thompson presented no evidence that his trial counsel failed to advise, or erroneously advised, Thompson of the effect of failing to adequately prepare for the penalty phase of the trial. He has therefore not shown his trial counsel's performance was deficient. Further, trial counsel did in fact adequately

prepare for the penalty phase,
see pp. 43-48, below.

...

In paragraph 19(a) Thompson alleges that trial counsel did not adequately investigate his case. This allegation is contradicted by the evidence submitted at the Rule 20 hearing.

Upon being appointed to represent Thompson in this case, trial counsel learned that Thompson had given a confession implicating himself as the sole perpetrator of this crime. Subsequent to that, trial counsel were told two or three different stories by Thompson as to what occurred on the night Maisie Gray was kidnapped, robbed, and murdered. However, he always maintained that he was involved in the robbery and kidnapping, although he told his attorneys he did not murder Maisie Gray.

Trial counsel repeatedly stressed to Thompson the importance of telling them the truth about what occurred on the night Maisie Gray was murdered. State's Exhibit 1 clearly establishes this fact. Thompson maintained that he did rob and kidnap Maisie Gray, but that Shirley Franklin actually murdered Maisie Gray. It was on this basis that trial

counsel conducted their investigation and developed their strategy.

Trial counsel testified, and this Court finds that testimony credible, that in preparing for this case, trial counsel interviewed law enforcement personnel involved in the investigation of this case; members of Thompson's family; Thompson himself; and, every person that Thompson named as being a possible witness for him in this case. Trial counsel testified, and Defendant's Exhibit 20 and 21 reflect, that they visited the scene of the crime and searched for witnesses in the community. Trial counsel did not find anyone in the community to testify on Thompson's behalf, except for two of his friends, Jackie Pope and Connie Pope, and his mother, Joyce Parker.

Trial counsel spoke with Thompson's mother about Thompson's childhood and any traumas he may have experienced. The contrary testimony of Thompson's mother, Joyce Parker, is not credible because, based on her testimony and demeanor, she was biased and not a credible witness. In their many hours of discussion with Thompson, trial counsel also asked Thompson about his childhood, educational

background, drug and alcohol problem, and religious background. Thompson's testimony to the contrary is not credible.

In addition, trial counsel filed many pretrial motions, including a motion to produce. Their motion to produce was granted and they reviewed material in the District Attorney's file. The trial attorneys also researched the legal and factual issues they anticipated would arise before and during trial.

Trial counsel filed the motions for psychiatric examination because this was a capital case and because they felt it would help them establish a diminished capacity defense. Trial counsel's motion for psychiatric examination and motion for independent psychiatric examination were both granted and Thompson was evaluated at Taylor Hardin Secure Medical Facility by a lunacy commission and by a private psychiatrist hired by trial counsel, Dr. R.A. Sleszynski.

In general, trial counsel's performance in investigating Thompson's case was thorough and Thompson has not demonstrated that trial counsel's performance was "outside the wide range of

professionally competent assistance." 466 U.S., at 690. He has not shown his trial counsel's performance was deficient with respect to his two specific allegations of inadequate investigation either.

In paragraph 19(b), Thompson claims that his trial counsel were ineffective because they failed to contact an eyewitness to the robbery of the victim. Thompson failed to name who the eyewitness to the robbery of Maisie Gray was and presented no testimony that there was in fact an eyewitness to the robbery of Maisie Gray. However, it appears from the testimony at the evidentiary hearing that Thompson is claiming that his trial counsel were ineffective for failing to contact a witness named Jack Lee Roberts.

Roberts is the same individual who is the basis of Thompson's Brady claim discussed on pp. 9-12, above. Trial counsel testified at the evidentiary hearing that they were aware that Roberts had given a description of an individual that he saw in the Majik Market shortly before Maisie Gray was discovered missing which description arguably did not fit the description of Thompson. However, based on their conversations with Thompson,

trial counsel did not investigate this information further. Thompson had consistently maintained that he committed the robbery and kidnapping of Maisie Gray and it was reasonable for trial counsel not to contact Roberts in light of that fact. Trial counsel's reliance on what Thompson told them in guiding their investigation was reasonable. As was noted in Strickland v. Washington, 466 U.S. at 690, the reasonableness of a counsel's actions may be determined or substantially influenced by what the defendant has told him.

Further, Thompson cannot establish prejudice with respect to this specific allegation of inadequate investigation. Roberts did not reveal to the police that he actually saw the robbery, kidnapping or murder of Maisie Gray. There is no evidence that, had this information been more thoroughly investigated, any more information would have been discovered. Thompson has failed to demonstrate that, but for counsel's performance in not contacting Roberts, the outcome of the trial would have been different.

In paragraph 19(f), Thompson claims trial counsel failed to investigate critical state witnesses. In his amended

petition, Thompson does not name what "critical state witnesses" were not adequately investigated. At the evidentiary hearing, the only critical state witness referred to by Thompson was Shirley Franklin. This Court finds that an adequate investigation was made of Shirley Franklin.

Prior to the trial of this case, trial counsel received a tape recorded statement by Shirley Franklin given to the Etowah County authorities during the investigation of this case. In the transcript of that statement, Defendant's Exhibit 12, Shirley Franklin implicated Thompson as the perpetrator of the robbery/kidnapping/murder of Maisie Gray. Trial counsel were told by Thompson that Shirley Franklin had a prior felony conviction and trial counsel continually, but unsuccessfully, tried to obtain some confirmation of that fact. They finally had Shirley Franklin brought in and questioned and she admitted in a tape recorded interview that she had a prior armed robbery conviction and several escapes.

The Saturday before trial, Dobson received a NCIC report indicating that Shirley Franklin had a criminal record and, on the morning trial

began, asked this Court to continue the case which it refused to do. Trial counsel also objected to Shirley Franklin's testimony during the trial of this case because they had not been provided information on her prior criminal record.

Trial counsel also investigated Shirley Franklin's community reputation. They in fact discovered one witness who agreed to testify that Shirley Franklin had held a gun to his head while robbing him. That witness later refused to testify, however.

Trial counsel's investigation of the State's witness Shirley Franklin was not outside the wide range of professionally competent assistance. It was in fact a thorough, complete investigation. Trial counsel did everything they could to obtain impeachment evidence on Shirley Franklin. That they were unsuccessful does not mean their performance was deficient.

...

In paragraphs 19(g), (t) and (x) of his amended petition in that part of the petition labeled "Grounds Of Petition", Thompson alleges that his trial counsel were ineffective because they failed to

adequately prepare, investigate, pursue, and present a defense strategy at the guilt phase of his trial. This allegation is without merit.

...

As was discussed on pp. 19-24, above, trial counsel developed their trial strategy based on the fact that Thompson continually maintained that he robbed and kidnapped Maisie Gray but that Shirley Franklin actually shot and killed Maisie Gray. Trial counsel's strategy at the guilt stage was to present evidence of Thompson's limited participation in the crime, to implicate Shirley Franklin as the murderer; and to present evidence of Thompson's diminished capacity due to his alcohol and drug use to negate the necessary intent. Trial counsel considered a possible insanity defense but based on their contact with Thompson and the report from Taylor Hardin Secure Medical Facility and the report from Dr. Sleszynski, a private psychiatrist hired by trial counsel, they rejected this defense. Trial counsel also attempted to have Thompson's statements to law enforcement authorities suppressed. Trial counsel's defense strategy was a reasonable strategy based on the facts presented to them.

Thompson has not shown that trial counsel's defense strategy at the guilt stage was deficient. In fact, it was a sound, reasoned strategy. Trial counsel made the type of sound strategic decision after reasonable investigation that the Supreme Court has found to be "virtually unchallengeable." Strickland, 466 U.S. at 690. Thompson also has not demonstrated prejudice as this Court finds that the evidence presented in this case established Thompson's guilt beyond a reasonable doubt.

Thompson claims in paragraphs 19(g) that trial counsel were specifically ineffective in their defense strategy because they failed to prepare Thompson to testify. This Court finds as a fact that trial counsel adequately discussed and prepared Thompson for trial and advised him of the defense strategy to be followed in his case. Trial counsel even went over the specific questions Thompson would be asked by them at trial. Therefore, trial counsel's performance was not deficient as to this specific claim. ...

Thompson claims in paragraphs 19(t) that trial counsel was ineffective because it was admitted in opening statement that Thompson had

kidnapped and robbed Maisie Gray and was present during her murder. Thompson presented testimony from Richard Jaffe regarding this specific allegation. It was Jaffe's opinion that trial counsel was ineffective for conceding guilt in opening statements. This Court rejects that opinion and finds that it was a reasonable strategic decision to admit Thompson's limited guilt in opening statements in order to diminish the impact of the evidence presented during the trial, especially in light of trial counsel's defense strategy to admit limited participation and argue that Thompson was less culpable than Shirley Franklin.

...

In paragraph 19(g) of the amended petition in the part of the petition labeled "Grounds Of Petition", Thompson alleges that his trial counsel were ineffective because they failed to seek to have the victim's body examined for blood or semen specimens which could have exculpated Thompson. Thompson presented no evidence in support of this claim at the evidentiary hearing and this allegation is without merit.

The victim's nude body was found submerged in water in an old well after over 20 days of

exposure to the elements. Trial counsel had obtained copies of the autopsy report on the victim. Thompson's trial counsel did not seek examination of the victim's body due to the fact that they felt that little information could be obtained from the victim because of this exposure. Based on the information they had, they did not think it was necessary to have the body examined for blood and semen specimens.

Trial counsel also had a strategic reason for not seeking to have the victim's body examined for blood or semen specimens. According to what Thompson told his trial counsel, the only male present at the well at the time Maisie Gray was pushed into it was Thompson. Trial counsel felt that an examination of the body for semen specimens may have revealed that Thompson raped the victim, as well as having kidnapped and robbed her. Trial counsel made a reasonable strategic decision to forego having the victim's body examined for blood and semen specimens. Further, Thompson has again failed to establish any prejudice from the failure of trial counsel to have the victim's body examined and this claim must fail.

...

In paragraphs 19(k) and (n) of his amended petition, in that part of the petition labeled "Grounds Of Petition," Thompson alleges his trial counsel were ineffective because they failed to prepare, investigate, and present a penalty phase defense strategy and effectively make a case for saving Thompson's life and this allegation is without merit.

...

Trial counsel knew before trial that there was a guilt phase and a penalty phase to a capital murder trial and they prepared for both phases prior to trial. The defenses to both phases were similar. As at the guilt phase, trial counsel presented evidence of Thompson's diminished capacity at the penalty phase through the testimony of his mother regarding his drug and alcohol abuse. Trial counsel also presented testimony regarding the effects of Thompson's father's death on him, in an attempt to garner sympathy for Thompson.

In addition, trial counsel spoke with family members, friends, people in the community, and anyone Thompson told them to talk to in an attempt to discover any possible mitigation. This investigation was

unsuccessful. They also questioned Thompson about his religious affiliation and he denied any. Finally, trial counsel also made a motion for psychiatric examination and motion for independent psychiatric examination both of which motions were granted by this Court. Trial counsel considered these reports and spoke with Dr. Sleszynski, the private psychiatrist hired by them. Based on the reports and their discussions with Dr. Sleszynski, they made a strategic decision, as is discussed more fully on pp. 52-56, below.

Thompson has failed to demonstrate that trial counsel's performance was deficient. They investigated possible mitigating circumstances prior to trial, and based on what they found from this investigation, developed their penalty phase defense strategy. Because of the problems in discovering any witnesses who would come forward to testify on Thompson's behalf, and because Thompson adamantly refused to testify before the jury at the sentence phase, trial counsel presented the only witness in mitigation that they had, Joyce Parker, Thompson's mother. This was not deficient performance by trial counsel.

Thompson has also failed to establish prejudice. At the evidentiary hearing, Thompson presented several witnesses to demonstrate that trial counsel's investigation was inadequate and as a result his case was prejudiced. Thompson took the stand and testified about his drug and alcohol problems; about his traumatic upbringing in a violent household; about his religious experiences; about head injuries he received as a child; about the effects of his father's death on him; and about other traumatic experiences growing up. Thompson testified that he did not tell his trial counsel about these experiences because they did not ask him about it. He also testified that he was not given the opportunity to testify at the penalty phase of his trial. This last contention of Thompson's is directly contradicted by Thompson's testimony at his 1985 trial. (TR. 847-49) It is also contradicted by trial counsels' testimony at the evidentiary hearing. This Court finds that trial counsel asked Thompson about his background in an attempt to discover evidence to present in mitigation and he failed to reveal to them the information regarding his background that he testified to at the evidentiary hearing. The Court

finds that the absence of this evidence at trial is attributable to Thompson's refusal to testify and not any deficiency in his counsels' performance.

...

Further, this Court finds that had this Court or the jury heard the testimony of Laura Thompson, Alfred Lett, and Jerry Fleming at trial, there is no reasonable probability that the outcome of the trial would have been different. Laura Thompson's testimony was not helpful to Thompson's claims to have extensively abused drugs and alcohol in that she entrusted her infant child to his care, including riding in a car driven by him. Alfred Lett's testimony was not helpful to Thompson's claim to have used drugs and alcohol extensively in that he described Thompson as a good worker and further had only limited contact with Thompson. Reverend Fleming had no contact with Thompson for many months preceding the crime. Additionally, all of these witnesses displayed a strong bias toward Thompson which undercuts their credibility. This testimony is far from compelling and does not create a reasonable probability that, had it been presented, Thompson would not have been sentenced to death.

Joyce Parker's testimony also does not establish prejudice. Parker testified that she was never contacted prior to trial about testifying on behalf of her son. This testimony was contradicted by trial counsel. It is also reflected in Dobson's fee sheet, Defendant's Exhibit 20, that he spoke with Thompson's mother prior to trial. This Court finds that trial counsel's testimony was credible and that Parker's was not. This Court also finds Parker's Rule 20 testimony was merely cumulative with respect to Thompson's drug and alcohol abuse and the affects on Thompson of his father's murder. Parker testified before the jury at trial as to that mitigation.

...

In paragraph 19(h), (s), and (w)(ii) of his amended petition in that part of the petition labeled "Grounds Of Petition," Thompson alleges that his trial counsel were ineffective because they failed to adequately investigate Thompson's emotional and mental health problems and limitations; because they failed to seek a prompt hearing on Thompson's motion for independent psychiatric examination; because they failed to procure an expert to

testify at the sentence phase of the trial; and, because they failed to object to the denial of Thompson's motion for a continuance so that Thompson could obtain an independent psychiatric examination. This allegation is without merit.

As was discussed on pp. 24-29, above, trial counsel conducted an extensive investigation of Thompson's background in an attempt to discover any possible mitigation. In addition, they asked for and received both a lunacy evaluation of Thompson at Taylor Hardin Secure Medical Facility and a private psychiatric examination by an examiner of their own choosing, Dr. R.A. Sleszynski, M.D. Based on their investigation and the results of these reports, trial counsel made a strategic decision to present evidence of Thompson's drug and alcohol problems and the effects of his father's death on Thompson through lay testimony. Thompson refused to testify before the jury at sentencing, so his trial counsel relied on Thompson's guilt phase testimony and the testimony of his mother in establishing this mitigating circumstance.

Trial counsel made a strategic decision not to use the information contained in

Dr. Sleszynski's report or to have Sleszynski testify for two reasons. First, they considered that the information in the report was open to rebuttal by the Taylor Hardin report. The Taylor Harin report established that Thompson was criminally responsible for his actions at the time of the crime even though at the time of "the alleged offense, it is possible Mr. Thompson was under the influence of self-administered intoxicants at that time." (CR. 83) Trial counsel felt that evidence from the Lunacy Commission report that Thompson was competent and that his self-administered intoxicants did not diminish his criminal responsibility could have been harmful to Thompson.

The second reason trial counsel did not use Sleszynski's report is because, after discussing the report with Sleszynski, trial counsel felt that Sleszynski was not sympathetic to their client and his attitude on the witness stand would be detrimental to their client. Trial counsel feared that, due to his lack of sympathy, Sleszynski could have harmed their client on cross-examination by the prosecution.

Trial counsel's strategic reasons for not using the

Sleszynski report were within the "wide range of reasonable professional assistance," and Thompson has not demonstrated any prejudice from failure to use the report or from failure to investigate his drug and alcohol problems further.

Thompson presented two experts with respect to this issue: Richard Jaffe, a criminal defense attorney and Dr. Bill Beidelman, a clinical psychologist. ...

Beidelman was and is a clinical psychologist licensed to practice in Alabama. Beidelman was hired by Thompson's present counsel to interview him. Based on this interview of Thompson; his psychological testing of Thompson; his review of records in this case; and discussion with Thompson's mother, it was Beidelman's testimony that Thompson was suffering from alcoholism; poly-substance abuse; and anti-social personality disorder in remission. Beidelman testified that this diagnosis was accurate as to the time of the crime, as well. These were the same diagnoses given by Sleszynski and one of the members of the Lunacy Commission that evaluated Thompson. Thompson's trial attorneys had this information and Thompson has not shown that

any failure to further investigate this issue prejudiced this case.

Thompson took the stand at the evidentiary hearing and testified about many things in his background including his alcohol and drug problems; his violent upbringing; traumatic experiences in his life; and head injuries he received as a child. Thompson discussed these problems with Beidelman and Beidelman still had the same diagnoses that prior examiners of Thompson had. Therefore, Thompson has not shown any prejudice from his trial counsel's failure to discover this information so that they could present it to an expert to examine.

...

In paragraph 19(y)(i)-(vi) of his amended petition in that part of the petition labeled "Grounds Of Petition", Thompson alleges his appellate counsel, John Dobson and B.J. McPherson, were ineffective because they failed to adequately prepare Thompson's appeal and because they failed to raise certain issues on appeal. Thompson's appellate counsel's performance in preparing and effectuating his appeal was not deficient.

Dobson testified that prior to preparing the appellate

brief in this case, he reviewed the entire record and wrote down all the adverse rulings made by this Court. He then researched all possible claims and decided based on that research to raise those claims he thought were likely to succeed. Dobson testified that he didn't raise several of the issues Thompson now claims he should have raised based on the law and his likelihood of success of the merits. In particular, he testified that he did not raise the venue issue; and the improper closing argument issue because based on his research, those issues would not have been successful on the merits. This Court finds that trial counsel ably researched and prepared Thompson's appeal in this case.

...

... The fact that Dobson and McPherson focused on issues other than those Thompson's current counsel has selected does not remove their representation of Thompson from the wide range of professionally competent assistance.

(CR. 254-297) As is illustrated in the above-cited facts, trial counsels' performance was not hindered by the

statutory fee cap on reimbursement for indigent representation. Although McPherson did testify that he and Dobson did not hire a private investigator because funds to pay that investigator would have had to have come out of his own pocket, McPherson and Dobson did their own, thorough investigations.

Furthermore, as to the confession issue, the evidence presented at the Rule 20 evidentiary hearing demonstrates that Thompson's confession was given knowingly, voluntarily and intelligently after he waived his constitutional rights. The only evidence that Thompson asserted his right to remain silent and right to counsel was Thompson's testimony and Thompson was found to be not credible.

ARGUMENT

I.

CERTIORARI SHOULD NOT BE GRANTED ON THOMPSON'S CLAIM THAT THE LIMITATIONS PLACED ON THE AMOUNT OF COMPENSATION THAT COUNSEL REPRESENTING INDIGENT CAPITAL MURDER DEFENDANTS CAN RECEIVE FROM THE STATE IN ALABAMA ARE UNCONSTITUTIONAL BECAUSE THEY RESULT IN THE INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner Michael Eugene Thompson claims that the limitations placed on the amount of compensation that counsel representing indigent capital murder defendants can receive from the state in Alabama are unconstitutional because they result in the ineffective assistance of counsel. There are three reasons why certiorari should not be granted to consider that issue.

A. This Court Should Deny
Certiorari Because It Lacks
Jurisdiction To Address The
Claim Because It Was Not
Properly Raised In Or
Decided By The Courts Below

This Court should not grant certiorari to review Thompson's claim that the limitations placed on the amount of compensation that counsel representing indigent capital murder defendants can receive from the state in Alabama are unconstitutional because this Court lacks jurisdiction to address the issue because it was not properly raised in or decided by the Alabama courts, below.

Thompson did not raise his claim regarding Alabama's indigent compensation statutes in the trial court, on direct appeal, or in his Rule 20 proceedings in the Rule 20 trial court. Thompson arguably raised his claim for the first time in the appeal from the denial of Rule 20 relief in the Alabama Court of

Criminal Appeals. That issue was not properly raised in the Alabama Court of Criminal Appeals because, under Alabama law, issues raised for the first time in an appeal from the denial of collateral relief are procedurally barred from being raised. See, e.g., Bell v. State, 518 So.2d 840 (Ala.Cr.App. 1987), cert. denied, 518 So.2d 840 (Ala.), cert. denied, 486 U.S. 1036 (1988); Jackson v. State, 501 So.2d 542, 544-545, 547 (Ala.Cr.App. 1986); Morrison v. State, 551 So.2d 435, 437 (Ala.Cr.App.), cert. denied, 551 So.2d 435 (Ala. 1989). There is no indication in the Alabama Court of Criminal Appeals' opinion that it considered Thompson's procedurally barred issue. Thompson v. State, 581 So.2d 1216 (Ala.Cr.App.), cert. denied, 581 So.2d 1216 (Ala. 1991).

This Court has repeatedly held that it will not consider issues not properly presented to and considered by the state courts. See, e.g., Street v. New York, 394 U.S. 576, 581-582 (1969); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945); Nelson v. County of Los Angeles, 362 U.S. 1, 9 (1960); McGoldrick v. Compaigne Generale Transatlantique, 309 U.S. 430, 434-435 (1940); S.R.A. v. Minnesota, 327 U.S. 570 (1946) (Stone, J., concurring). "Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, ... See, e.g., Bailey v. Anderson, supra; Chicago, R. & L.R. Co. v. McGuire, 196 U.S. 128, 131-133, 49 L.Ed. 413, 415, 417, 25 S.Ct. 200 (1905)." Street v. New York, 394 U.S. at 581-582. Because

Thompson failed to properly raise his claim in the state courts, below, and because the state courts did not address his claim as a result of improper presentation, this Court has no jurisdiction to consider the claim and certiorari should not, therefore, be granted.

B. This Court Should Deny
Certiorari Because The
Claim Is Not Clearly
Presented In This Case

In his certiorari petition, Thompson contends that the limitations placed on the amount of compensation that counsel representing indigent capital murder defendants can receive from the State in Alabama are unconstitutional because they result in the ineffective assistance of counsel. An essential premise of that argument, that Thompson received ineffective assistance as a result of the

compensation limitations, is not clearly presented by the record in this case. Instead, the record indicates to the contrary. A review of the facts as found by the Rule 20 trial court, which are presumptively correct, clearly and unequivocally demonstrate that Thompson received the effective assistance of counsel and that the compensation limitations contained in Ala.Code §15-12-21 and 15-12-22 (1975) in no way interfered with counsels' representation. Therefore, the issue of whether Alabama's compensation limitations result in the ineffective assistance of counsel is not clearly presented in this case and this Court should not grant certiorari to consider that issue.

C. This Court Should Deny
Certiorari Because The
Claim Lacks Merit

This Court should also deny certiorari on Thompson's claim that the limitations placed on the amount of compensation that counsel representing indigent capital murder defendants can receive from the state in Alabama are unconstitutional because they result in the ineffective assistance of counsel because, as this case demonstrates, the compensation limitations do not result in the ineffective assistance of counsel and Thompson's claim lacks merit.

Ala. Code §15-12-21(d) (1975)
provides:

(d) Counsel appointed in cases described in subsections (a), (b) and (c) above, including such cases tried de novo in circuit court on appeal from a juvenile proceeding, shall be entitled to receive for their services a fee to be approved by the trial court. The amount of such fee shall be

based on the number of hours spent by the attorney in working on such case and shall be computed at the rate of \$40.00 per hour for time expended in court and \$20.00 per hour for time reasonably expended out of court in the preparation of such case. The total fees to any one attorney in any one case, from the time of appointment through the trial of the case, including motions for new trial, shall not, however, exceed \$1000.00, except as follows: In cases where the original case involves a capital offense or a charge which carries a possible sentence of life without parole, the limits shall be \$1000.00 for out-of-court work, plus payment for all in-court work, said work to be billed at the aforementioned rates. Counsel shall also be entitled to be reimbursed for any expenses reasonably incurred in such defense to be approved in advance by the trial court. Retrials of a case shall be considered a new case.

Ala. Code §15-12-22(d) (1975) contains similar provisions for indigent defendant appellate work.

As is readily discernable, the only limitation on the amount of compensation in a capital case, such as this, is the \$1,000 limit on out-of-court work. An attorney representing an indigent capital defendant is also entitled to compensation for all of his in-court time and, under the statute, is entitled to all reasonable expenses, if approved ahead of time.

Thompson argues that the compensation limitations are unconstitutional because they deny the capital murder defendant the effective assistance of counsel. As understood by the State, the claim is that the limitations are governmental action which interfere with counsel's ability to conduct a defense and the defendant thereby receives ineffective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 686 (1984).

However, the record in this case does not show that counsel did not perform any act necessary to the preparation of a defense because of the limitations and Thompson's claim must, therefore, fail.

In support of his claim that the compensation limitations result in the ineffective assistance of counsel and did result in the ineffective assistance of counsel in his case, Thompson relies on the statement of trial counsel that he did not hire an investigator to help in this case because funds for that investigator would have had to have come out of his own pocket. First, it is important to note that Thompson's trial counsel did not say that he would have had to have paid for "an investigation" out of his own funds, as Thompson claims on page 30 of his petition. Thompson's trial counsel testified only that he did

not hire a private investigator to aid in the investigation because that investigator would have had to have been paid out of his own funds. (R. 228)

Second, it is important to note that, under the compensation statute, trial counsel could have applied for funds to hire an investigator as a reasonable expense, as many capital defense attorneys do, if they had felt it necessary. Trial courts in Alabama often approve funds to hire investigators in capital cases. And, third, it is important to note that, in spite of the fact that a private investigator was not hired in this case, Thompson's trial attorneys conducted a thorough investigation.

Thompson had lived almost his entire life in and around Blount County, Alabama. Therefore, an investigation

requiring a great deal of time and money was not necessary in this case.

Thompson's trial counsel spoke with "the law enforcement personnel involved in the investigation of this case; members of Thompson's family; Thompson himself; and, every person that Thompson named as being a possible witness for him in this case." (CR. 261) They spoke extensively with Thompson and his mother about Thompson's background, including his childhood, educational background, drug and alcohol problem, and religious background, and investigated that background based on what they were told. (CR. 261) In addition, trial counsel thoroughly investigated for the penalty stage of Thompson's trial and, specifically, attempted to obtain a mental health expert to testify on behalf of Thompson. There is not one thing that

counsel did or did not do because of compensation limitations and Thompson's attempt to portray counsel as inept and inadequate in order to demonstrate that Alabama's indigent compensation system results in inadequate representation must fail.

Finally, it should be noted that most of Thompson's claims of ineffective assistance of counsel, see footnote 12 on pages 33-34 of his petition, in no way require the expenditure of funds or inordinate expenditures of time. Contrary to Thompson's claims, his experienced defense counsels' performance was reasonable and they rendered effective assistance. None of Thompson's ineffective assistance of counsel claims had any merit (CR. 255-297) and Alabama's compensation limitations not only had no effect on trial counsel's representation,

they had no effect on the outcome of Thompson's trial.

Thompson claims that Alabama's compensation limitations result in the per se ineffective assistance of counsel in capital cases. Thompson claims that the Strickland v. Washington, 466 U.S. 668 (1984), standard for evaluating ineffective assistance of counsel claims is not appropriate in addressing claims regarding compensation limitations and that the issue cannot be decided on a case-by-case basis applying Strickland. However, this Court rejected a claim that compensation limitations would cause counsel to be per se ineffective in an analogous situation in Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 630 n. 7 (1989). Furthermore, the cases relied on by Thompson in which other states have held that compensation

limitations can be unconstitutional because they can result in the ineffective assistance of counsel do not support Thompson's claim.

In Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986), the Florida Supreme Court acknowledged that statutes limiting compensation to appointed counsel are not per se, or facially, unconstitutional. Id., at 1112. However, that court went on to hold that under "extraordinary and unusual" circumstances, a trial court in Florida could order compensation above the maximum amounts contained in the statute where necessary to insure the effective assistance of counsel. Id., at 1115. The Florida Supreme Court did not hold that the indigent compensation statute was unconstitutional, but held that, in certain cases, it could result in the

deprivation of an indigent defendant's Sixth Amendment right. The Florida courts are, therefore, to look at claims regarding compensation limitations and ineffective assistance of counsel claims on a case-by-case basis. The Florida Supreme Court's decision in White v. Board of County Commissioners, 537 So.2d 1376 (Fla. 1989), did not alter the case-by-case approach taken in Florida, either. In White, the Florida Supreme Court did hold that a capital murder case was always "extraordinary and unusual" as those terms were used in Makemson and that a trial court could always, therefore, order compensation above the statutory limitations. 537 So.2d at 1380. However, that court did not hold that the failure to grant compensation above the statutory limits results in a Sixth Amendment violation. There is a

distinct and important difference between what the Florida Supreme Court held and what Thompson is asking this Court to hold.

Because the limitations placed on the amount of compensation that counsel can receive for representing indigent capital murder defendants from the state in Alabama do not per se result in the ineffective assistance of counsel, and because these limitations did not result in the ineffective assistance of counsel in this particular case, this Court should not grant certiorari to review Thompson's claim.

II.

CERTIORARI SHOULD NOT BE
GRANTED ON THOMPSON'S CLAIM
THAT THE ADMISSION OF HIS
COERCED CONFESSION WAS
UNCONSTITUTIONAL

Thompson alleges in part II of his petition that his waiver of his right to

counsel and his confession were the result of coercive tactics, that they were, therefore, involuntary, and that the admission of his confession was unconstitutional. Thompson also claims for the first time in his petition for writ of certiorari that the Alabama appellate courts' interpretation of the degree of evidence needed to prove that Thompson's waiver of his right to counsel and his confession were voluntary violated constitutional requirements. There are three reasons why certiorari should not be granted to consider that issue.

- A. This Court Should Deny Certiorari Because It Lacks Jurisdiction To Address The Claim Because It Was Not Properly Raised In Or Decided By The Courts Below

This Court should not grant certiorari to review Thompson's claims

regarding the voluntariness of his confession because this Court lacks jurisdiction to address the issue because it was not properly raised in or decided by the Alabama courts, below.

Thompson raised his claim regarding the voluntariness of his confession at trial and on the direct appeal of his case in the Alabama appellate courts. See Thompson v. State, 503 So.2d 871, 877 (Ala.Cr.App. 1986), aff'd, 503 So.2d 887 (Ala. 1987). The Rule 20 trial court, in accordance with Alabama law, found that Thompson's claim regarding the voluntariness of his confession was procedurally barred from review in his collateral proceeding because the claim was raised and addressed on appeal. (CR. 237) In Alabama, claims which are raised and addressed on direct appeal are barred from further review. See, Alabama Rules of Criminal Procedure Rule 32.2(a)(4);

see also, Richardson v. State, 419 So.2d 289, 291 (Ala.Cr.App.), cert. denied, 419 So.2d 289 (Ala. 1982), cert. denied, 460 U.S. 1017 (1983); Ex parte Clisby, 501 So.2d 483, 484 (Ala. 1986); Waldrop v. State, 523 So.2d 475, 477 (Ala.Cr.App. 1987), cert. denied, 523 So.2d 475 (Ala. 1988), cert. denied, 109 S.Ct. 184 (1988). The Alabama appellate courts affirmed the Rule 20 trial court's holding which was based strictly on state law grounds. Thompson v. State, 581 So.2d 1216, 1220, 1221 (Ala.Cr.App.), cert. denied, 581 So.2d 1216 (Ala. 1991).

This Court has repeatedly held that it will not consider issues not properly presented to and considered by the state courts. See, e.g., Street v. New York, 394 U.S. 576, 581-582 (1969); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945); Nelson v. County of Los Angeles, 362 U.S. 1, 9 (1960); McGoldrick v. Compaigne

Generale Transatlantique, 309 U.S. 430, 434-435 (1940); S.R.A. v. Minnesota, 327 U.S. 570 (1946) (Stone, J., concurring). This Court is without jurisdiction to review a claim which is decided strictly on state law grounds. See 28 U.S.C. §1257(3).

Furthermore, to the extent that Thompson is claiming that the Alabama appellate courts' interpretation of the degree of evidence needed to prove that Thompson's waiver of his right to counsel and his confession were voluntary violated constitutional requirements, that claim is not properly before this Court because it was not raised in any of Thompson's state court proceedings. This Court has repeatedly held that it will not consider questions raised for the first time in a certiorari petition. Street v. New York, 394 U.S. 576, 581-582

(1969); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945).

Because Thompson's claims regarding the voluntariness of his confession were not properly raised in and decided by the state courts below, this court has no jurisdiction to consider them.

B. This Court Should Deny Certiorari Because The Claim Is Not Worthy Of Certiorari Consideration

Thompson is requesting that this Court grant certiorari on his claim regarding the voluntariness of his confession, a claim which involves a simple application of this Court's prior decision in Miranda v. Arizona, 384 U.S. 436 (1966), and its progeny, to the facts of this case. This Court is well aware of the great demands on its time to decide issues of far reaching impact.

The voluntariness of the confession claim raised by Thompson will only apply to his case and is simply of such narrow scope and limited precedential value that it is not worthy of certiorari review.

C. This Court Should Deny
Certiorari Because The
Claim Is Without Merit

In the direct appeal of his case, Thompson raised the issue of the voluntariness of his confession. The Alabama Court of Criminal Appeals correctly held that Thompson's claim was without merit. See, Thompson v. State, 503 So.2d at 877-878. The Alabama appellate courts did consider all the facts surrounding Thompson's confession. It did not merely establish voluntariness on the basis of what occurred during Thompson's interview. It did establish the voluntariness requirement in accordance with the law.

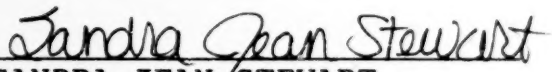
The Alabama Court of Criminal Appeals applied the proper legal standards as established by this Court and correctly held that both Thompson's waiver of his constitutional rights and his confession were voluntary. This Court should deny certiorari on Thompson's claim that his confession was inadmissible because it was coerced because that claim is without merit.

CONCLUSION

For the foregoing reasons, this Court should deny Thompson's petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this day served three copies of the foregoing Brief in Opposition To Certiorari on the attorneys for petitioner:

Hon. Stephen T. Waimey
Hon. H. David Henry
Hon. Vincent J. Davitt
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by placing a copy of same to them in the United States Mail, properly addressed and with postage prepaid:

Done this 13th day of January, 1992, ~~December, 1991~~.

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